2015

New York Ave., LLC, a Utah Limited Liability Company, Plaintiff and Appellee, and Cross-Appellant, v. David D. Harrison, and Individual, and Jan C. Harrison, and Individual, Defendants and Appellant : Brief of Appellee and Cross-Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Appellee, and Cross-Appellant, v. DAVID D. HARRISON, an individual; and JAN C. HARRISON, an individual; Defendant and Appellant.	Appellate Case No: 20140719-SC (Appeal from the Fourth Judicial District Case No. 090402295 Judge: David N. Mortensen)

BRIEF OF APPELLEE AND CROSS-APPELLANT

Jason D. Boren
Emily L. Wegener
BALLARD SPAHR LLP
Attorney for Defendant and Appellant
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801)531-3000

David D. Jeffs
Kevin D. Jeffs
JEFFS & JEFFS, P.C.
Attorney for Plaintiff, Appellee & Cross-Appellant
90 North 100 East
P.O. Box 888
Provo, Utah 84603
Telephone: (801) 373-8848

IN THE UTAH COURT OF APPEALS

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Appellee, and Cross-Appellant, v. DAVID D. HARRISON, an individual; and JAN C. HARRISON, an individual; Defendant and Appellant.	Appellate Case No: 20140719-SC (Appeal from the Fourth Judicial District Case No. 090402295 Judge: David N. Mortensen)

BRIEF OF APPELLEE AND CROSS-APPELLANT

David D. Jeffs
Kevin D. Jeffs
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, Utah 84603
Telephone: (801) 373-8848

Jason D. Boren
Emily L. Wegener
BALLARD SPAHR LLP
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801)531-3000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTION

The Utah Supreme Court has jurisdiction over this case pursuant to UTAH CODE ANN. §78A-3-102. The matter has been assigned to the Utah Court of Appeals pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

RESPONSE TO STATEMENT OF ISSUES PRESENTED FOR REVIEW ON HARRISONS APPEAL

The Harrisons have misstated certain of the issues presented for review on their appeal and the standard of appellate review. A corrected statement of the issues presented for review and any correction to the standard of appellate review are as follows:

ISSUE NO. 1: Whether the district court erred in holding that NYA did not breach the covenant of good faith and fair dealing when it exercised its contractual right to extend the specific settlement date by the monthly payment of additional earnest money.

ISSUE NO. 2: Whether the district court erred in holding that the Harrisons breached the REPC by refusing NYA's valid tender of payment that only contained conditions that NYA had a right to insist upon under the REPC and therefore was unconditional.

ISSUE NO. 3: No correction.

ISSUE NO. 4: Whether the district court erred in holding that NYA did not breach the REPC as a matter of law because Harrison's breach excused NYA from making additional earnest money deposits and closing the purchase of the Property. The court

reviews the "interpretation of the contract" and the effect of Harrison's breach for "correctness." Green River Canal Co. v. Thayn, 2003 UT 50, ¶16, 84 P.3d 1134.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

ISSUE NO. 1: Whether the district court erred in holding that the REPC required NYA to make a demand for liquidated damages to be entitled to recover liquidated damages from Harrisons. The court reviews a district court's interpretation of a contract and its grant of summary judgment for correctness. Green River, 2003 UT 50, ¶16. *See also* Selvig v. Blockbuster Enters., LC, 2011 UT 39, 266 P.3d 691. This issue was preserved in NYA's Motion for Partial Summary Judgment (R290-319), and its Motion for Summary Judgment for Damages and Liquidated damages (R728-762) and reply (R802-852).

ISSUE NO. 2: Whether the District Court erred in holding that by not making a demand for liquidated damages NYA had elected to pursue other remedies available at law, namely actual damages. An appellate court reviews a district court's interpretation of a contract for correctness and also reviews the district court's grant of summary judgment for correctness. Green River, 2003 UT 50, ¶16. The Court reviews whether an election of remedies has been made under a correctness standard. Selvig, 2011 UT 39. This issue was preserved in NYA's Motion for Partial Summary Judgment (R290-319), its Motion for Summary Judgment for Damages and Liquidated damages (R728-762) and reply (R802-852).

ISSUE NO. 3: Whether the District Court erred in holding that NYA had elected the remedy of actual damages and was therefore not entitled to pursue nor recover liquidated damages from Harrisons. An appellate court reviews a district court's determination as to whether an election of remedies has been made under a correctness standard. Selvig, 2011 UT 39. This issue was preserved in NYA's Motion for Partial Summary Judgment (R290-319), its Motion for Summary Judgment for Damages and Liquidated damages (R728-762) and reply (R802-852).

ISSUE NO. 4: If NYA is entitled to recover liquidated damages, whether the district court erred in failing to award NYA its attorneys fees with respect to the claims for liquidated damages. An appellate court reviews a district court's determination whether an election of remedies has been made under a correctness standard. Selvig, 2011 UT 39. An appellate court reviews a district court's determination of who is the prevailing party under an abuse of discretion standard. R.T. Nielson Co. v. Cook, 2002 UT 11, 40 P.3d 1119. This issue was preserved in NYA's Motion for Partial Summary Judgment (R290-319), its Motion for Summary Judgment for Damages and Liquidated Damages (R728-762) Affidavits of Attorneys Fees (R402-411, 414-454, 461-462) and reply (R802-852), its Motion to Amend or Augment Attorneys Fee Award (R900-910) and its Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorneys Fee Award (R927-939) and reply (R991-1006).

ISSUE NO. 5: Whether the district court erred in failing to award NYA certain of its attorneys fees including for research. An appellate court reviews the amount of attorneys fees awarded by the district court under an abuse of discretion standard. Dale K. Barker

Co., PC v. Bushnell, 2010 UT App 189, 237 P.3d 903. This issue was preserved in NYA's Motion for Partial Summary Judgment (R290-319), its Motion for Summary Judgment for Damages and Liquidated Damages (R728-762) Affidavits of Attorneys Fees (R402-411, 414-454, 461-462) and reply (R802-852), its Motion to Amend or Augment Attorneys Fee Award (R900-910) and its Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorneys Fee Award (R927-939) and reply (R991-1006).

ISSUE NO. 6: Whether the District Court erred in failing to award NYA interest on the amount of the Earnest Money Deposits made by NYA from the date of each such payment. An appellate court reviews a district court's determination as to the entitlement to pre-judgment interest under a correctness standard. Anderson v. Doms, 2003 UT App 241, 75 P.3d 925. This issue was preserved in NYA's Motion for Summary Judgment for Damages and Liquidated Damages (R728-762).

ISSUE NO. 7: If NYA is entitled to recover liquidated damages, whether the District Court erred in failing to award NYA interest on NYA's liquidated damages. An appellate court reviews the entitlement to pre-judgment interest under a correctness standard. Anderson, 2003 UT App 241. This issue was preserved in NYA's Motion for Summary Judgment for Damages and Liquidated Damages (R728-762).

DETERMINATIVE PROVISIONS AND STATUTES

UTAH CODE ANN. §15-1-1(2) (Interest rate to be 10% per annum where contract does not specify rate of interest) (Attached as Exhibit 1)

STATEMENT OF THE CASE

NYA and Harrisons entered into a Real Estate Purchase Contract with addenda (collectively "REPC") in November 2006 under the terms of which NYA was purchasing the real property of Harrisons with a settlement deadline or closing date[1] of October 31, 2007. The REPC had an initial earnest money deposit of $10,000. It also permitted NYA, at its sole discretion, to make monthly $6,250.00 payments of additional earnest money in order to extend the settlement date of the REPC on a monthly basis beyond the October 31, 2007 settlement date to the end of the next month. NYA paid the initial earnest money deposit of $10,000 and beginning in October, 2007 monthly paid additional earnest money deposits totalling $137,503.00 in order to extend the settlement date on a monthly basis.

In March, 2009, contrary to the express terms of the REPC, Harrisons unilaterally asserted that a reasonable time for NYA to close had already passed, that NYA was in breach by failing to close and demanded that NYA close by August 5, 2009 or they would exercise their rights under the REPC. Following unsuccessful settlement discussions, the instant litigation was commenced by NYA in June, 2009 with a counterclaim filed by Harrisons in July, 2009. Consistent with previous months, on August 31, 2009, NYA tendered another $6,250 earnest money deposit in order to extend the closing date for an additional month. Although NYA had the right to extend the closing in its sole discretion by making such monthly payment, because the payment was

being tendered beyond Harrisons' demanded August 5, 2009 closing date and because of the pending litigation, NYA included a letter of explanation as to its reasons for extending. The letter requested an acknowledgement from Harrisons that NYA was entitled to extend the closing in accordance with the express terms of the REPC. Harrisons rejected NYA's valid tender, returned NYA's earnest money deposit, demanded the withdrawal of what were characterized as "inappropriate conditions" and asserted that the NYA's actions constituted additional breaches of the REPC.

The parties filed cross motions for summary judgment. The court granted NYA's motion and denied Harrisons' motion, ruling that:

(a) NYA was not obligated to close within a reasonable time because the REPC provided for a specific closing date and for unlimited monthly extensions of the specific closing date;

(b) NYA had not breached the REPC or the implied covenant of good faith and fair dealing;

(c) NYA's tender of the August 2009 earnest money payment was valid tender because it only included conditions NYA had a right to insist upon;

(d) Harrisons breached the REPC by refusing the August 2009 tender of additional earnest money deposit; and

(e) NYA was entitled to its contractual remedies under the REPC against Harrisons.

---

[1] Although October 31, 2007 is referred to in the REPC as the "Settlement Deadline" and the process as "Settlement". "Settlement" and "Deadline" may be referred to herein as "Settlement Date" or "Closing Date" and the process as "Closing".

NYA filed a subsequent motion for summary judgment for its damages, liquidated damages and attorney's fees. NYA was granted judgment for damages for the $147,503 earnest money deposits which it had paid to Harrisons, interest thereon but only from August 31, 2009 and certain of its attorneys fees. The court denied NYA judgment for liquidated damages equal to the earnest money deposits as provided in the REPC and interest thereon because it incorrectly ruled that NYA had elected to pursue other remedies at law namely actual damages. The court also denied certain of NYA's attorneys fees including those associated with its liquidated damage claims because it was not the prevailing party on the liquidated damages issue.

Harrisons have appealed the judgement and NYA has cross appealed with respect to the denial of its claims for liquidated damages, interest and attorneys fees.

RESPONSE TO HARRISONS' FACTUAL BACKGROUND

Many of Harrisons' Factual Background are not facts, but are argument. In addition, portions of Harrisons' Factual Background states or mischaracterizes the facts before the court. NYA responds to certain of such facts below with the paragraph numbering conforming to Harrisons' paragraph numbering. Other responses are included in NYA's argument.

19. Two months after litigation commenced, on August 31, 2009, NYA purported to make an Extension Payment (the "Disputed Extension Payment"). The Disputed Extension Payment was accompanied by a three-page letter from NYA's counsel outlining NYA's interpretation of the REPC (the "August 31

Letter"). (R.116-18 (a copy of the Letter from K. Kelly to M. Gaylord et al., dated August 31, 2009 ("August 31 Letter") is attached to the addendum as Exhibit 8).) It made acceptance of the Disputed Extension Payment contingent on the Harrisons' acceptance of NYA's interpretation as set forth in the Amended Complaint. (R.116-18; August 31 Letter.)

NYA's Response: Harrisons mischaracterize the letter which (1) did not outline NYA's interpretation of the REPC but rather stated the reasons for the right to extend and for the Second Addendum; and (2) instead stated that acceptance of the check was acknowledgement of NYA's right to continue to extend the closing in accordance with the express terms of the REPC and added no new conditions to acceptance of the earnest money deposit payment.

20. In the August 31 Letter, NYA set forth its understanding of the terms of the REPC as follows:

[Harrisons' quoted portion of the letter is omitted herein.]

NYA's Response: Harrisons mischaracterize the August 31 Letter which did not state NYA's understanding of the REPC but rather stated NYA's understanding of the reasons for the right to extend and for the Second Addendum.

26. On June 14, 2012, the Court issued a Ruling on Cross Motions for Summary Judgment ("Ruling"). (R.384-401.) The Harrisons appeal this Ruling and related Order, which held among other things, that:

(a) Because NYA could extend the contract at its discretion, it did not deprive the Harrisons of the fruit of the contract when it exercised its discretion. (R.387-88.)

(b) NYA was not required to purchase the Property within a reasonable time because the REPC permitted it to exercise its discretion to extend closing indefinitely. (R.386-87.)

(c) The Disputed Extension Payment constituted valid tender because the letter accompanying the payment contained only conditions the Harrisons had agreed to when they permitted NYA to extend closing at its discretion. (R.389-91.)

NYA's Response: Contrary to Harrisons' mischaracterization of its ruling, the trial court ruled that:

(a) Because the REPC granted NYA the right to extensions according to its discretion that to find NYA in breach would be inconsistent with the express terms of the REPC and would enforce duties to which the parties didn't agree. (R387-8)

(b) Because the REPC included a specific closing date subject to extensions that the court could not impose a reasonable time for closing (R393). The REPC does not limit the number of extensions to which NYA is entitled (R392-3, 386-7)

(c) Because the REPC permitted extensions in NYA's sole discretion, the letter setting out the reasons for extending were irrelevant and do not add additional

terms to the contract but only contain conditions on which NYA already had the right to insist. (R389-390)

NYA'S STATEMENT OF FACTS

1. On November 10, 2006, NYA, as buyer, and Harrisons, as sellers, entered into a Real Estate Purchase Contract for Land and Addendum No. 1 ("REPC") to purchase 20.27 acres of real property located in Springville, Utah (the "Property"). (R.40-41, ¶ 7,8, and 10, REPC and Addendum No. 1 attached as Exhibit 2 .)

2. Addendum No. 1 set the settlement deadline to be 180 days from the date of the fully executed contract and permitted NYA, in its sole discretion, to choose to pay an additional amount of non refundable earnest money at the rate of $12,500 per month to extend the contract monthly beyond the set settlement date. (R.24, Addendum No. 1 ¶¶ 3 and10)

3. Less than two weeks later, on November 22, 2006, the parties entered into a second addendum modifying the REPC ("Addendum No. 2"). (R.39, ¶15; Addendum No. 2 (attached to the addendum as Exhibit 3) Among other things, Addendum No. 2, the settlement deadline to October 31, 2007, and reduced the additional earnest money deposits to be paid for monthly extensions of the settlement deadline to $6,250 per month. (R.21, Addendum No. 2 ¶ 4-5)

4. In October, 2007 NYA began making additional monthly earnest money deposits and continued making such additional monthly earnest money deposits until after Harrisons rejected and returned the August 31, 2009 earnest money deposit. (R241-242).

5. On March 5, 2009, Harrisons notified NYA that "any reasonable time for closing has already passed" and that NYA's failure to close was "a breach of the implied covenant of good faith and fair dealing." Harrisons stated that notwithstanding NYA's breach that Harrisons were willing to close on or before August 5, 2009, but that if NYA did not close, Harrisons reserved their rights and remedies in the REPC. (R.124-125, March 5 Letter attached to Addendum as Exhibit 4). Contrary to Harrisons' Factual Background, the March 5th letter does not invite NYA to propose a reasonable settlement deadline. Nor was NYA obligated to close within a reasonable time. ((R. 24, Addendum No. 1 ¶ 3, 10, R. 21, Addendum No.2 ¶ 4-5)

6. On June 24, 2009, NYA filed an amended complaint against Harrisons for rescission, breach of contract, and declaratory judgment. (R.21-41.) On July 27, 2009, Harrisons filed their answer and counterclaim for breach of contract and breach of the covenant of good faith and fair dealing in which Harrisons asserted that NYA had breached the REPC and the covenant of good faith and fair dealing by failing to close within a reasonable time. (R.42-58.)

7. NYA continued to make and Harrisons continued to accept NYA's additional monthly earnest money deposits through July, 2009. (R.241-242)

8. On August 31, 2009, NYA tendered an additional monthly earnest money deposit (the "Rejected Payment") accompanied by NYA's counsel's letter (the

"August 31 Letter"). (R. 116-18 (a copy of the August 31, 2009 Letter from K. Kelly to M. Gaylord ("August 31 Letter") is attached to the addendum as Exhibit 5).

9. Even though the REPC allowed NYA to extend the settlement date in its sole discretion, the August 31 Letter set forth NYA's understanding of the reasons for NYA's extension right and the reduction in the monthly earnest money deposits. NYA's understanding and reasons were that the purchase price was based on the ability of NYA to develop the Property, the availability of the sewer line and storm drainage capacity, and the ability to extend the closing date was to allow postponement until it was economically feasible to develop the Property and so it could be developed to maximum potential. (R. 116-18; August 31 Letter.)

10. Because Harrisons previously demanded August 5, 2009 closing date had passed, the August 31 Letter sought acknowledgement of NYA's continued right to extend the closing in accordance with the express terms of the REPC, in its sole discretion, by making monthly payments of additional earnest money stating:

> By negotiating this $6,250 check, you are agreeing with my client that it is entitled under the REPC to make these payments in order to postpone closing in accordance with the express terms of the REPC until it is economically feasible to move forward with a residential development of the property as discussed above, including in paragraphs (a) through (d). My client is simply seeking the benefit of its bargain under the REPC, and nothing more – in light of you claims that my client may not now close under the REPC. Nothing in this letter should be construed as a demand by my clients for any rights or benefits other than those provided under the REPC.

(R.116; August 31 Letter at 3.)

11. The Harrisons rejected the Rejected Payment and returned the check to NYA's counsel. (R. 114-15 (September 2, 2009 Letter from J. Boren to K. Kelly, ("September 2 Letter")) attached to the addendum as Exhibit 6)

12. Although the REPC permitted NYA to monthly extend the settlement deadline in its "sole discretion", Harrisons claimed that NYA was attempting to modify the terms of the REPC. Harrisons further stated that the tender of the Rejected Payment with the requested acknowledgement from Harrisons of NYA's right to extend the settlement date on a monthly basis under the express terms of the REPC constituted an inappropriate condition to the tender and an additional breach of the REPC and demanded that NYA withdraw what they characterized as "your inappropriate conditions." (R.114-15 September 2 Letter).

13. Because Harrisons improperly rejected the Rejected Payment and breached the REPC, NYA did not make any subsequent monthly additional earnest money deposits. (R.190, 241)

14. NYA paid an initial earnest money deposit of $10,000.00 and between October, 2007 and July, 2009, had paid additional earnest money deposits of $137,503.00. (R.283)

15. In late 2011 and early 2012, NYA and Harrisons cross-moved for summary judgment. (Harrisons' motion for summary judgment (R.110-80.); NYA's opposition (R.192-224); and Harrisons' reply (R.229-65). NYA's cross-motion for partial

summary judgment (R.290-319.); Harrisons' opposition (R.325-51) and NYA's reply (R.352-82)).

16. On June 14, 2012, the Court issued a Ruling on Cross Motions for Summary Judgment ("2012 Ruling"). (R.384-401) and on December 31, 2012 entered an Order on Cross Motions for Summary Judgment ("2012 Order"). (R.508-510). (2012 Ruling and 2012 Order Attached to Addendum as Exhibit 7)

17. On January 22, 2013, Harrisons filed a motion to reconsider the 2012 Ruling and 2012 Order which was responded to by NYA.

18. On July 5, 2013, the Court issued a Ruling on Motion to Reconsider (R.700-704) and on October 18, 2013 entered an Order on Harrisons' Motion to Reconsider (R.721-725). (Ruling and Order on Motion to Reconsider attached to Addendum as Exhibit 8)

19. On December 13, 2013, NYA filed a Motion for Summary Judgment for Damages and Liquidated Damages (R.728-762) in which NYA sought its contractual damages consisting of the return of the $147,503.00 earnest money deposits which it had made, liquidated damages in an amount equal to its $147,503.00 earnest money deposits, prejudgment interest on the earnest money deposits from the date each payment was made, interest on the liquidated damages amount from August 31, 2009 (the date of Harrisons' breach) and its costs and attorneys fees. Harrisons' opposition (R766-797), and NYA's Reply (R.802-852).

20. On May 30, 2014, the Court entered its Ruling on Motion for Partial Summary Judgment on Damages (R863-870) (attached to addendum as Exhibit 9). On July 1, 2014, the Court entered its Order and Judgment on NYA's Motion for Summary Judgment for Damages ("July 2014 Order") (R.921-924 attached to addendum as Exhibit 10). NYA was awarded the return of its initial and additional earnest money deposits in the amount of $147,503.00, interest on the earnest money deposits from August 31, 2009, the date of Harrisons' breach, attorneys fees of $59,607.25, and court costs of $360.00. NYA was not awarded any liquidated damages.

21. On July 7, 2014, NYA filed its Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorneys Fee Award (R.927-939). Harrisons' Opposition (R.947-987); and NYA's Reply Memorandum (R.991-1006).

23. On October 24, 2014, the Court entered its Ruling on Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorney Fee Award (R1068-1072). On November 18, 2014 entered its Order and Judgment on NYA's Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorneys Fee Award (R.1080-1082). (The Order and Judgment are attached as Exhibit 11) The Court augmented the attorney fee award from $59,607.25 to $67,629.25 and thereby increased the total judgment to $286,495.75.

24. On August 6, 2014, NYA filed a Notice of Cross Appeal (R.1010-1011). The Notice of Cross Appeal appealed the portion of the July 2014 Order which determined that NYA was not entitled to its liquidated damages, failed to grant NYA its

attorneys fees with respect to the liquidated damages as well as other attorneys fees that were not awarded, and failed to award NYA interest to which it was entitled.

25. On November 20, 2014, NYA filed a Notice of Amended or Supplemental Cross Appeal (R.1083-1085) which amended or supplemented its earlier cross appeal because the Court failed in the November 18, 2014 Order to award NYA certain of its additional attorneys fees including those associated with its damages and liquidated damages claims.

SUMMARY OF ARGUMENT

Because the Real Estate Purchase Contract had a specific date for performance which could be extended at NYA's sole discretion on a monthly basis to subsequent specific dates, NYA was not required to close the purchase within a reasonable time demanded by the Harrisons. Despite the fact that NYA had the right to extend the settlement date on a monthly basis in its sole discretion upon payment of additional earnest money, Harrisons claim that NYA's failure to close within a reasonable time constitutes a breach of the implied covenant of good faith and fair dealing. However, the implied covenant cannot be read to establish new independent rights to which the parties did not agree, cannot create rights and duties inconsistent with the express contractual terms cannot compel a party to exercise a right to its own detriment to benefit the other party, nor to comport with the court's sense of justice but which is inconsistent with the terms of the contract. To hold that NYA was in breach of the covenant for failing to close within a reasonable time would be inconsistent with the terms of the REPC and the

other principles of the implied covenant. In addition, the agreed purpose for NYA's purchase of the property was for development and the justified expectations of the parties were that NYA would purchase the property for and when it was able to develop the property. Although NYA had sole discretion to extend the closing date for the property, the exercise of its discretion to extend the closing until the property could be developed was for a purpose reasonably within the contemplation of the parties. There was no breach of the implied covenant of good faith and fair dealing in NYA's extensions of the closing date.

NYA's tender of the August 31, 2009 Rejected Payment to Harrisons with a letter requesting that Harrisons acknowledge that NYA was entitled to continue to extend the settlement deadline under the express terms of the Real Estate Purchase Contract did not impose any new or additional conditions and was a valid tender. Since NYA was entitled to extend the settlement date at its sole discretion, an explanation as to its reasons for the exercise of its discretion did not obligate the Harrisons to any new or additional terms than those to which they were already obligated under the Real Estate Purchase Contract.

Harrisons' rejection and return of the Rejected Payment constituted a breach of the Real Estate Purchase Contract which excused NYA's further performance under the Real Estate Purchase Contract and entitled NYA to its contractual remedies including the return of the earnest money deposits it had paid. The REPC did not impose any requirement for notification to or demand from Harrisons of liquidated damages under the REPC in order to elect to pursue liquidated damages. NYA did not elect to pursue

actual damages, but elected to pursue and is entitled to recover liquidated damages from Harrisons.

NYA is entitled to an award of additional attorney's fees for time spent on research regardless of whether the items of research are designated because Utah case law has not required that level of specificity as to the work performed, is entitled to attorney's fees associated with its liquidated damages claims because it is entitled to recover such liquidated damages from Harrisons and is entitled to its attorney's fees on appeal.

In accordance with Anderson, *Supra,* NYA is entitled to pre-judgment interest on its earnest money deposits from the date of each payment to Harrisons, not just from the date of Harrisons' breach. NYA is also entitled to pre-judgment interest on its liquidated damages from the date of Harrisons' breach. The interest rate is 10% per annum as provided by UTAH CODE ANN. §15-1-1(2).

ARGUMENT

I. NYA DID NOT VIOLATE THE COVENANT OF GOOD FAITH AND FAIR DEALING WHEN IT EXERCISED ITS EXPRESS CONTRACTUAL RIGHTS

The district court correctly ruled that NYA did not breach the implied covenant of good faith and fair dealing in exercising its express right under the REPC to extend the settlement date monthly by paying additional earnest money deposits.

The underlying principle of the implied covenant of good faith and fair dealing was stated in Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶14, 94 P.3d 193 as follows:

> Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party's rights to receive the benefits of the contract.

Further as stated in US Fid. v. US Sports Specialty, 2012 UT 3, ¶20, 270 P.3d 464 the covenant requires the parties "to act consistently with the agreed purpose and the justified expectations of the other party."

"To determine the purpose, intentions and expectations of the parties, we consider the contract language and the course of dealings between and conduct of the parties." Cook Assocs. v. Utah Sch. & Institutional Trust Lands Admin., 2010 UT App 284, ¶29, 243 P.3d 888. It is well settled that "[w]here the language within the four comers of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language . . . " Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC, 2009 UT 27, ¶25, 207 P.3d 1235. Because courts want to give effect to the parties' intentions as expressed in the contract, they should not rewrite the parties' agreement for them. Hidden Meadows Dev. Co. v. Mills, 511 P.2d 737, 739 (Utah 1973). "The implied covenant of good faith and fair dealing performs a significant but perilous role in the law of contracts . . . yet the judicial inference of contract terms is also fraught with peril, as its misuse threatens 'commercial certainty and breed[s] costly litigation." Young Living Essential Oils, LC v. Marin, 2011 UT 64, ¶8, 266 P.3d 814 (Utah 2011) The courts have also stated that they will not interpret the implied covenant of good faith and fair dealing to make a better contract for the parties than they made for themselves. Brown v. Moore, 973 P.2d 950, 954 (Utah 1998). In light of these concerns, significant limitations are imposed on

the implied covenant. In Markham v. Bradley, 2007 UT App 379, ¶19, 173 P.3d 865, the Court of Appeals described those limitations as follows:

> However, the application of the covenant is limited by some general principles:
>
> > First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. Second, this covenant cannot create rights and duties inconsistent with express contractual terms. Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.

Finally, "There is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights." PDQ Lube Ctr. v. Huber, 949 P.2d 792, 798 (Utah App. 1997).

Harrisons asserted that NYA breached the implied covenant because it failed to close by a date unilaterally and arbitrarily selected by Harrisons and which they characterize as a reasonable time. However, the REPC itself provides that the property was being purchased for development. See REPC ¶ 1.2, Addendum 1, ¶ 2, 7, and 8, and Addendum 2, ¶ 1. Consistent with intended development, Addendum 1 ¶ 10 also provided that NYA had the discretion to pay an additional amount of non-refundable earnest money in order to extend the settlement deadline on a monthly basis. Addendum 1 contained no limitation of the number of NYA's extensions. Within two weeks of the signing of the REPC and Addendum 1, NYA discovered a problem with sewer line availability. NYA informed Harrisons that NYA was not going to be able to

develop the property as planned and it might be sometime before it could be developed. As a result of those discussions, Addendum 2 was executed which extended the settlement date to October 31, 2007 and reduced the amount of the additional earnest money deposits to be paid for monthly settlement extensions. (See Answers to Interrogatories Pages 4-6, 10-12, and 18-22). Again, Addendum 2 had no limitation on the number of NYA's extensions of the settlement date. Nor did the parties include a back-end or drop dead date by which NYA would have to close.

Harrisons' assertion that NYA's failure to close by a "reasonable" date violates the limitations and restrictions of the implied covenant. Their assertion establishes new rights and duties to which the parties had not agreed, namely the obligation for NYA to close within a reasonable time and the right of Harrisons to demand such closing. The assertion creates rights which are inconsistent with the express contractual terms of the REPC, namely NYA's right to monthly extend the settlement date by payment of additional earnest money without limitation as to the number of such extensions and without a backend or drop dead date. It compels NYA not to exercise its right to extend the settlement deadline to NYA's detriment in order to benefit Harrisons. Finally, and authoritatively, there can be no violation of the duty of good faith where NYA is exercising its express contractual right to extend the closing date. The trial court correctly ruled that there was no breach of the implied covenant by NYA.

The express terms of the REPC, establish NYA's right to extend the settlement date. Its contractually permitted extensions of the settlement date were not

breaches of the implied covenant of good faith and fair dealing. The trial court correctly granted NYA's summary judgment motion that it had not breached such covenant.

Harrisons argue that because NYA had the right to extend the REPC in its sole discretion, and that no express standard for its exercise is stated, that the covenant imposes an objective standard of reasonableness which the Harrisons argue means that NYA was required to close the purchase within a reasonable time. Harrisons' argument is not supported by Utah law.

It is true that Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶20, 84 P.3d 1154 stated that:

> The degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms.

But the Markham, supra court in ¶34 described the permitted purposes for exercise of discretion as follows:

> The good faith performance doctrine may be said to permit the exercise of discretion for any purpose—including ordinary business purposes—reasonably within the contemplation of the parties. *A contract thus would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range*—a reason beyond the risks assumed by the party claiming the breach.

But Harrisons do not invoke the implied duty to refrain NYA from actions that will intentionally destroy or injure Harrisons' right to receive the fruits of their contract, instead they seek to impose a new covenant on NYA, namely the obligation to close within a reasonable time. The courts "have set a high bar for the invocation of a new covenant." Young Living, 2011 UT 64, ¶10 and have further stated:

> . . . the court may recognize a covenant of good faith and fair dealing where it is clear from the parties' "course of dealing" or a settled custom or usage of trade that the parties undoubtedly would have agreed to the covenant if they had considered and addressed it *Id.* ¶43. No such covenant may be invoked, however, if it would create obligations "inconsistent with express contractual terms" *Id.* ¶45. ... Where the court adopts a covenant enshrined in a settled custom or usage of trade, it is simply endorsing a universal standard that the parties would doubtless have adopted if they had thought to address it by contract. Where the parties themselves have agreed to terms that address the circumstance that gave rise to their dispute, by contrast, the court has no business injecting its own sense of what amounts to "fair dealing."

Even the course of dealing and conduct of the parties indisputably show that NYA's extensions of the settlement date were consistent with the agreed purpose and justified expectations of the parties and therefore cannot be breaches of the implied covenant.

Harrisons simplify the alleged intent and expectations of the parties to the statement that the parties entered into a purchase contract and not an option contract or a seller financed purchase and that NYA breached such expectations by not closing within the "reasonable" time set, post- execution, by Harrisons. However, from the REPC and the communications and conduct of the parties, it is clear that the agreed purpose and the justified expectations of the parties were that NYA was purchasing the property for development. NYA could extend the closing date in its discretion. There were no limitations to the number of NYA's extensions in either Addendum. There was no back end or drop dead date in the REPC. There were no restrictions or limits on the reasons for NYA to make any such extensions. Their justified expectation was that NYA would not close the purchase until such development was feasible, as it determined.

The parties conduct and communications also were consistent with there being no limitations on the number of extensions and the justified expectation that the purchase

would not occur until development was feasible. In the January, 2007 and September 2007 letters, Mr. Kelly separately informed Harrisons about the development progress and informed the Harrisons that he would begin making the monthly payments and make them until NYA closed on the property. (See January and September 2007 letters. R169-152). Nothing in either letter limited the number of NYA's extensions or indicated that NYA intended to close before the property could be developed or to close within a "reasonable time". Harrisons did not object to either of NYA's letters.

Harrisons presented no evidence in conjunction with either cross-motion for summary judgment disputing that the number of settlement extensions were unlimited. Nor that prior to the initial October, 2007 settlement date, it was their intent or expectation that closing would occur prior to when the property was developed or within a "reasonable" time. Harrisons are presumed to know Utah law and that where a REPC provides a specific date for performance, such as closing, that a reasonable time for performance cannot be imposed by a court. See discussion below. Harrisons cannot have had a justified expectation that the closing would occur within a "reasonable" time. Harrisons presented no facts or evidence of a course of dealing between them or of a settled custom that shows that parties would undoubtedly have limited the number of extensions, that they would have required NYA to close within a reasonable time, or included a drop dead date to close. As stated in *Young*, where the parties themselves agreed to the terms of the REPC which specifically address the dispute namely, terms of extension of the settlement date, the "court has no business injecting its own sense of what amounts to 'fair dealing.'" Young Living, 2011 UT 64, ¶10. In contrast, the REPC,

NYA's letters and the other evidence are consistent with the parties agreed purpose and justified expectations, that NYA could and would extend the settlement date until the Property could be developed. Consistent with the REPC and his word NYA commenced making the monthly payments on October 31, 2007 and continued making accepted monthly payments until rejected.

From the undisputed facts, it is clear that the agreed common purpose and justified expectations of the parties were that NYA would purchase the property for NYA's development purposes, that NYA could extend the settlement deadline by the monthly payment of additional earnest money deposits, that NYA would not close and would not be required to close the purchase until NYA could develop the property. There was no agreed purpose or justified expectation that NYA's extensions would be limited nor that NYA would close within a reasonable time. NYA's exercise of its discretion to extend the settlement date until the Property could be developed was within the "ordinary business purposes reasonably within the contemplation of the parties." NYA's exercise of its discretion to extend the settlement date until the property could be developed was not "outside the contemplated range" nor "a reason beyond the risks assumed by" Harrisons. Markham, 2007 UT App 379, ¶34.

Ironically, it is Harrisons who breached the covenant of good faith and fair dealing when, after accepting NYA's additional earnest money deposits for nearly two years, they demanded that NYA close the purchase by their unilaterally and arbitrarily designated August 5, 2009 date in direct contravention of the express contractual terms.

The district court correctly ruled that it was not a violation of the covenant good faith and fair dealing for NYA to exercise its discretion to extend the REPC in accordance with the express terms of the REPC. There was no violation of the covenant of good faith and fair dealing, as a matter of law, because NYA was simply exercising its contractual rights. (R 701, quoting PDQ Lube, 949 P.2d at 798). This Court should affirm the district court's ruling and order denying Harrisons' motion and confirming that NYA did not breach the covenant of good faith and fair dealing[2].

II. THE REPC SPECIFICALLY STATED THE TIME FOR NYA'S PERFORMANCE AND THE COURT CAN NOT IMPLY A REASONABLE TIME NOR LIMIT THE NUMBER OF EXTENSIONS

"[I]f the language within . . . the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language," Green River, 2003 UT 50, ¶17. Furthermore, because courts are to give effect to the parties' intentions as expressed in the contract, courts should not rewrite the parties' agreement. "[A] contract should be reformed only when its terms are so vague that the intention of the parties cannot be ascertained therefrom." Hidden Meadows, 511 P.2d at 739.

Utah law is clear that "when a contract specifically states the time for its performance, it is plain error to allow it to be performed within a reasonable time. A court may allow a contract to be performed within a reasonable time only when the contract is silent as to the time for its performance." Watson v. Hatch, 728 P.2d 989, 990 (Utah

[2] If the court were to determine that there may be a breach of such covenant despite NYA merely exercising its contractual rights, then there are disputed issues of fact which

1986). Coulter & Smith, 966 P.2d at 858. In contracts where time is of the essence "the stipulation of the contract must be exactly complied with." Roberts v. Braffett, 92 P. 789, 793 (Utah 1907). It is only "where a contract or conveyance *expresses no time for the performance* of an act contemplated by such contract or conveyance, a reasonable time is implied." Salt Lake City v. State, 125 P.2d 790, 793 (Utah 1942) (emphasis added).

The REPC and addenda explicitly provide the specific time for settlement namely October 31, 2007. NYA had the option to pay additional earnest money to extend such specific settlement date. If NYA paid additional earnest money, settlement was extended for one month to the end of the next calendar month. Settlement would be extended to the end of each successive month as additional earnest money deposits were made by NYA. At all times, the REPC stated a specific time for NYA's performance. There is no ambiguity regarding the settlement date or its extension to another specific settlement date. Accordingly, neither Harrisons nor the court can imply a reasonable time for NYA's performance. There is no ambiguity that the REPC provided for an unlimited number of NYA's extensions. The court cannot reform the REPC to limit the number of NYA's extensions.

Harrisons assert that NYA's right to extend the specific settlement date by making monthly payments does not make the time for performance definite or specific and that the court should have imposed a reasonable time for performance. Harrisons have cited no cases that the ability of a party to extend, or repeatedly extend the time of performance, in particular the closing date, to another specific date means that the

---

would preclude the court from granting Defendants' motion for summary judgment.

contract has no specific time for performance or that a reasonable time for performance may be imposed. NYA is unaware of any such case.

The court is referred to Hidden Meadows, *supra,* which involved an option agreement that provided: "This contract is automatically renewed from year to year unless notice of cancellation is given by either party prior to October 1 of any year." The court interpreted the contract to mean that if no notice of termination was given by October 1, 1970, it would be extended for the following year, and so on. There were no limitations in the agreement as to how many times the option could be extended. The Court held that "in the contract under consideration in this matter we think the language is clear, certain, definite, and unambiguous. As the judge said, there is no need for reformation." Id. at 739. Even though the option agreement continued year by year, the *Hidden Meadows* court did not impose a requirement that closing occur within a reasonable time, nor limit the number of extensions.

Because the REPC clearly and unambiguously set a specific date for settlement and for monthly extensions of such date to subsequent specific dates for performance, neither Harrisons nor the Court may impose a reasonable date for NYA's closing of the purchase. This Court should affirm the district court's ruling denying the Harrisons' Motion for Summary Judgment and hold that Harrisons could not impose a reasonable time for closing.

Even if the court could impose a reasonable time for closing, Utah law is that the determination of what is a reasonable time is a question of fact that could not be decided by the trial court on summary judgment nor by this court on appeal. "[W]hat is

reasonable is a question of fact." Ferris v. Jennings, 595 P.2d 857, 860 (Utah 1979). "[W]hat is a reasonable time under the circumstances ... is a factual determination" Coulter & Smith, 966 P.2d at 858. It is only "if the facts are undisputed, the question is one of law for the court. If the facts are in dispute and the question rests on inference, it is one of fact." Salt Lake City, 125 P.2d at 793.

Harrisons assert that IHC Health Servs. v. D&K Mgmt., 2008 UT 73 (Utah 2008) allows the court to determine a reasonable time as a matter of law. However, *IHC* did not involve a reasonable time, but a waiver and even then the court applied the summary judgment standard to only permit such determination if the facts were undisputed. Harrisons also cite to Contimortgage Corp. v. Mortgage Am., Inc., 47 F. Supp. 2d 575, 578 (E.D. Pa. 1999) that the court may decide what is a reasonable time as a matter of law. Such case has no precedential value in Utah since it is a Pennsylvania federal district court. More importantly, the case does not stand for the Harrisons' assertion. The *Contimortgage* court stated it could only make determination of a reasonable time for performance as a matter of law in a recurring commercial transaction that happened in the same way and with the same data day after day. Id The instant case does not involve such recurring circumstance.

Harrisons argue that a reasonable time for NYA's performance had and that NYA breached by failure to close by August 5, 2009 which they asserted was a reasonable time as a matter of law. In their brief Harrisons now identify five "undisputed" facts that they assert enable the court as a matter of law to determine NYA's breach for failure to close b August 5, 2009. NYA has disputed that Harrisons' arbitrarily designated August 5, 2009

closing date was a reasonable time to close and that NYA was in breach in failing to so close in their response to Harrisons' Motion for Summary Judgment. The court is referred to such response for more detail as to its dispute of Harrisons' facts. (R212-224, 202-207)

It is clear from the five facts cited by Harrisons in their brief that the court cannot decide as a matter of law what a reasonable time for closing is or that NYA breached by failing to close by August 5, 2009: (1) The parties agreed to an October 31, 2007 closing date and an unlimited number of NYA's extensions. Such specific dates, do not mean August 5, 2009 was a reasonable date but preclude Harrisons from imposing a reasonable time to close: (2) NYA's letter indicating that closing shouldn't be too far in the future. Such letter and statement were not incorporated into the REPC and do not modify it: (3) NYA did not terminate the REPC during the due diligence period. This fact is irrelevant since the REPC provided the ability to extend closing to accommodate the sewer installation. (4) Harrisons notified NYA in March, 2009 that they would have to close by August 5, 2009 which Harrisons assert gave NYA a reasonable time to pull financing together and to close. Harrisons raise for the first time, without any factual support, that the 5 months was sufficient to secure financing. It is also irrelevant since the purchase was dependent on development of the property, not financing. (5) time is of the essence of the REPC. This fact is irrelevant because of the extension right. From such limited facts, the court could not determine a reasonable time for performance based on the totality of the circumstances. Moreover, none of such provisions address in any way NYA's clearly manifested intent to purchase the property for development and the

identified issues and difficulties of such development which would affect the reasonableness of any closing date.

Even if the Court were to determine that a reasonable time for performance could be imposed on NYA, disputed issues of fact precluded the trial court and this court from determining as a matter of law that August 5, 2009 was a reasonable time for NYA's performance or that NYA breached by failing to close by such date. The court should deny that Harrisons' appeal that NYA was required to close within a reasonable time.

III. THE AUGUST 2009 EARNEST MONEY DEPOSIT WAS VALIDLY TENDERED

The district court correctly ruled that the tender of the August 2009 earnest money deposit was unconditional because it contained only conditions upon which NYA already had a right to insist. "A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon." Sieverts v. White, 273 P.2d 974 (Utah 1954). "The tender cannot impose on the other party a new condition or requirement not already imposed by the contract....A party to a bilateral contract may, however, properly condition a tender on the other's performance, since such a condition does not impose a requirement beyond that already contained in the contract." Kelley v. Leucadia Fin. Corp., 846 P.2d 1238, 1243 (Utah 1992). The focus is whether the tender demands "new" or "additional" obligations or merely demands performance of what the other party was already required to do.

When NYA tendered the Rejected Payment, it merely demanded performance already required of Harrisons under the REPC. The August 31 Letter sought

acknowledgement from Harrisons of NYA's continued right to extend the closing in accordance with the express terms of the REPC by making monthly payments of additional earnest money. Harrisons would then fulfill their obligations under the REPC by accepting NYA's earnest money deposits and extending the closing. Requesting acknowledgment from Harrisons that they would continue to comply with the REPC cannot be deemed an additional or new condition that would render NYA's tender conditional or invalid. The August 31 Letter specifically stated "Nothing in this letter should be construed as a demand by my clients for any rights or benefits other than those provided under the REPC." This statement made it abundantly clear that NYA was not imposing any new or additional conditions. It was reasonable for NYA to seek such confirmation after the Harrisons claimed NYA was in breach of the REPC, and demanded that NYA close by August 5, 2009.

Harrisons assert that NYA's tender was invalid and imposed additional conditions because the REPC was silent as to the economic feasibility of development of the property, the availability of the sewer line and storm drain capacity but the Letter included terms not expressly stated in the REPC. Harrisons' assertion is hypertechnical and their focus wrong. The correct analysis is not whether the words of the tender letter were included in the REPC but whether the tender imposed additional obligations on Harrisons. It did not. The REPC permitted NYA to extend the settlement date in its sole discretion upon payment of the agreed additional earnest money deposit with no restriction as to the reason. Because NYA could extend the settlement in its discretion by making payment, it was unnecessary to specify the reasons or basis for the extension and

could extend without a stated reason. If the agreed additional earnest money deposit was timely paid, Harrisons were obligated to accept it and extend the settlement date for one month. Since the REPC granted NYA an unlimited number of extensions and did not restrict the reasons for extension, the letter did not impose any new or additional obligation or condition by requesting acknowledgement of NYA's continued right to extend until it was economically feasible to the develop the property, consistent with sewer line availability and storm drain capacity. Harrisons incorrectly argue that acceptance would have waived their claims for a reasonable time to close or breach of the implied covenant. But in reality Harrisons had no such claims anyway. NYA's seeking of confirmation of its right to extend until such development circumstances occurred was actually consistent with the agreed purpose and justified expectations of the parties. Harrisons argue that because NYA included an explanation its actions in extending the contract pursuant to the express terms of the contract, NYA's tender is invalid. Under Harrisons' analysis, had NYA simply sent a one line letter extending the settlement date with a check it would have been acceptable tender, but in explaining its thinking for making the election to extend, NYA rendered the tender conditional and invalid. The illogic of Harrisons' position is clear. NYA's tender did not impose any new or additional conditions or terms not already imposed by the REPC and did not violate Harrisons' rights under the implied covenant.

Harrisons assert that they were required to object to NYA's tender or waive any such objection under UTAH CODE ANN. §78B-5-802(3). Such section is inapplicable. It applies to written offers to pay a sum of money, deliver a written instrument or specific

personal property (UTAH CODE ANN. §78B-5-802(1)). The person to whom tendered is to specify any objection to the amount of money, terms of the written instrument or the amount or kind of property. The section does not apply to the terms or conditions under which the written instrument is tendered.

Harrisons misstate or mischaracterize Century 21 All W. Real Estate & Inv. v. Webb, 645 P.2d 52 (Utah 1982) that the buyers had not made a valid tender because they insisted that the sellers accept their interpretation of their contract's requirements. The contract provided that mortgages and encumbrances were to be paid by the seller, but there was a dispute as to whether seller had an obligation to remove a Citicorp encumbrance prior to closing. However, the Court's holding was actually that a letter asserting that the buyer was "ready and willing to close" the transaction, particularly when buyer had asserted, without contractual support, that the Citicorp encumbrance be satisfied before closing, was not a tender let alone an unconditional tender of buyer's money or payment obligation.

NYA's tender of the Rejected Payment was timely, was consistent with Harrisons' existing obligations under the REPC and was unconditional. Harrisons breached the REPC by reject the Rejected Payment. This Court should affirm the district court's ruling that NYA's tender of the Rejected Payment was valid and that Harrisons breached the REPC by refusing to accept such tender.

IV. HARRISONS FAILED TO PERFORM WHEN THEY REFUSED TO ACCEPT NYA'S TIMELY EARNEST MONEY DEPOSIT AND EXTEND CLOSING.

The court found that Harrisons had breached the REPC by their refusal of NYA's valid tender. Harrisons confuse their actual breach of the REPC with an anticipatory breach. "[A] party's refusal to perform under the terms of an agreement constitutes a breach of that agreement." Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992). Harrisons had a contractual obligation to accept the timely tender of the Rejected Payment and to extend the settlement deadline. Instead they rejected the Rejected Payment and returned it to NYA. Harrisons make the nonsensical argument that Harrisons "never refused to extend the closing deadline, only to accept the $6,250 payment to do so." They also allege that Harrisons did not repudiate their obligation to sell the Property to NYA within 30 days. Harrisons assertion is false. The tender of the Rejected Payment was to extend the closing date an additional 30 days and not have to immediately close. Harrisons did not extend the settlement date. They repudiated their obligation to sell asserting in the September 2009 letter that NYA's failure to validly tender the Rejected Payment constituted another breach of the REPC for which Harrisons would amend their pleadings. Harrisons subsequently filed for summary judgment asserting that NYA's tender of the Rejected Payment was a breach of the REPC and that Harrisons were entitled to retain the earnest money.

In contrast to a breach, an anticipatory breach is committed before the time of performance when a party manifests a positive and unequivocal not to render its promised performance. Id. Harrisons have asserted that their refusal to accept the Rejected Payment was not such a positive or unequivocal manifestation of their intent. However, such principle applies to anticipatory breaches and not to actual breaches.

Their breach consisted of their then present refusal to perform their obligations under the REPC. Their claimed manifestation of intent to perform is irrelevant once they have actually breached by rejecting NYA's tender. The court correctly determined that Harrisons breached the REPC by refusing to accept NYA's valid tender.

It is well settled law that a "material breach by one party to a contract excuses further performance by the nonbreaching party." Holbrook v. Master Protection Corp., 883 P.2d 295, 301 (Utah App. 1994). The first party to substantially or materially breach "cannot complain if the other party thereafter refuses to perform." CCD, L.C. v. Millsap, 116 P.3d 366, 373 (Utah 2005) (internal quotation omitted). Harrisons were the first party to breach the REPC by their rejection of the Rejected Payment and cannot complain if NYA thereafter doesn't perform by making additional earnest money deposits or by closing the purchase.

Because NYA's additional earnest money deposit was timely made and was consistent with the terms of the REPC, Harrisons materially breached the REPC by rejecting it and refusing to extend the closing. This Court should affirm the district court's ruling that Harrisons materially breached the REPC by refusing to accept NYA's valid tender of the August 31, 2009 Rejected Payment, returning it to NYA and refusing to extend the closing.

V. THE HARRISONS FAILED TO PRESERVE THE ISSUE OF MATERIALITY OF THEIR BREACH OF THE REPC.

For the first time on appeal Harrisons raise the issue that their breach in rejecting the Rejected Payment was not a material breach. It is well settled that "to properly

preserve an issue for appellate review, the issue must be raised in the district court....the issue must be specifically raised, in a timely manner, and must be supported by evidence and relevant legal authority." Donjuan v. McDermott, 2011 UT 72, ¶20, 266 P.3d 839. Harrisons have never raised the issue of the materiality of their breach in rejecting the Rejected Payment, in any motion or otherwise. The issue has not been preserved for appeal.

Strangely Harrisons' assertion is apparently based in part on the amount of the $6,250 Rejected Payment in relation to the $3,000,000 purchase price. It is unclear how rejection of a $6,250 payment regardless of the purchase price can be immaterial. Applying Harrisons apparent logic, that the $6,250 payment and its refusal was not material in light of the $3,000,000, NYA should not have had to tender the payment at all to secure the thirty day extension it desired, and any failure by NYA to tender what Harrisons now claim is an immaterial amount could not have been a breach by NYA. Obviously, Harrisons' logic is nonsensical.

Regardless, Harrisons' assertion that their breach was not material is wrong. Without going into all of the factors of a material breach, since this issue was not previously raised by Harrisons and would be a question of fact anyway, their breach was clearly material. NYA contracted for the right to monthly pay additional earnest money to extend settlement and the closing. The settlement date and the right to extend it were substantial and material provisions of and crucial components of the REPC. NYA would be and was deprived of such benefits as a result of Harrisons' breach. Harrisons cannot now attempt to ignore the importance of the tender and rejection of the Rejected Payment

in order to claim that their breach was not material. Their current position is inconsistent with their position throughout the lawsuit. Harrisons rejection of the Rejected Payment was a material breach.

VI. NYA DID NOT ELECT TO PURSUE ACTUAL DAMAGES BUT ELECTED TO AND WAS ENTITLED TO RECOVER LIQUIDATED DAMAGES

The district court incorrectly held that NYA had elected the remedy of actual damages and therefore that NYA was not entitled to recover liquidated damages under the REPC in an amount equal to the amount of the Earnest Money Deposit as that term was defined in the REPC.

A. NYA PLEAD ALTERNATIVELY FOR ACTUAL AND LIQUIDATED DAMAGES FOR HARRISONS' BREACH

The general rule of election of remedies is set forth in Angelos v. First Interstate Bank, 671 P.2d 772, 778, (Utah 1983) where the Supreme Court stated that:

> The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a *choice* between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others. *Royal Resources, Inc. v. Gibralter Financial Corp.*, Utah, 603 P.2d 793, 796 (1979) (emphasis in original) (footnotes omitted).

The purpose of the election of remedies is to prevent a double redress for a single wrong. However, the Utah Rules of Civil Procedure and modern pleading practice allow a party to plead alternative theories and even to have such theories presented to the court or jury. Utah R. Civ. P 8(a) sets very minimal requirements for pleading an original claim:

> (a) *Claims for relief.* An original claim, counterclaim, cross-claim or third-party claim shall contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded. . . .

Utah courts have adopted a very liberal approach to pleading. In MBNA Am. Bank, N.A. v. Goodman, 2006 UT App 276, ¶6, 140 P.3d 589 the court stated:

> Under our liberal standard of notice pleading, a plaintiff is required "to submit a 'short and plain statement . . . showing that the pleader is entitled to relief' and a demand for judgment for the relief.'" *Canfield v. Layton City*, 2005 UT 60, P14, 122 P.3d 622 (omission in original) (quoting Utah R. Civ. P. 8(a)(1)-(2)). "The plaintiff must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.
>
> In addressing the pleading of alternative remedies, the Court in Parrish v. Tahtaras, 318 P.2d 642, 645 (Utah 1957) stated:
>
> > The alternate remedies, although formerly limited by a strict election doctrine, may be pleaded in alternative form and may even be inserted by amendment late in the proceedings. Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279 (Utah 1953); U.R.C.P. 54(c)(1).
> >
> > Consistent with *Parrish* Utah R. Civ. P 54(c)(1) provides that:
> >
> > ... every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in his pleadings.** [Emphasis added].

A party is to include a short plain statement that it is entitled to relief and make a demand for judgment for the relief. It is entitled to judgment for the relief to which the party is entitled even if it has not demanded that relief. NYA's amended complaint satisfied these liberal pleading requirements. It sets forth three claims including, first, rescission of the REPC, second, if the court found the REPC was a binding agreement

that NYA was entitled to damages, and third, declaratory judgment. In the prayer of the second claim upon which the court granted NYA summary judgment from Harrisons' breach, Plaintiff prayed that NYA be granted "a judgment awarding New York the damages that it incurred as a result of the Defendants' breach of the REPC." (R 33)

NYA's amended complaint did not state that it sought actual damages nor did it state that it was not seeking liquidated damages. Rather it merely included typical general pleading language under Rule 8 seeking damages under the REPC for the Harrisons' breach. NYA has been unable to locate any Utah cases which have held that a party is required in its complaint to assert whether it seeks liquidated damages or actual damages. NYA's amended complaint does not constitute an election under *Angelos* by choosing the remedy of actual damages and evidencing that NYA was electing to forego liquidated damages.

In its 2012 summary judgment motion (R290-319), NYA sought not only the return of the earnest money deposits it had made, but liquidated damages in an amount equal to the earnest money deposits. In its subsequent summary judgment motion for damages, NYA again sought the return of its earnest money deposits and liquidated damages in an amount equal to the earnest money deposits. (R728–752) Such motions notified Harrisons of NYA's claim that Harrisons pay NYA its liquidated damages and constituted demands therefore.

B. NYA WAS NOT REQUIRED TO NOTIFY HARRISONS OF ITS ELECTION TO SEEK LIQUIDATED DAMAGES BY A WRITTEN DEMAND OR NOTICE.

The trial court nonetheless held that NYA was obligated to make a written notice to and demand on Harrisons for liquidated damages and that by failing to do so NYA had contractually elected to pursue actual damages.

REPC ¶16 provides as follows:

> DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect to either accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand.

Under ¶16 there is a difference between the respective elections of buyer and seller seeking liquidated damages. Sellers elect liquidated damages by retaining the earnest money deposit. In order for sellers to sue to enforce the contract or to pursue other remedies at law, sellers are contractually obligated to first return the earnest money deposit. Consistent with the language of the REPC, sellers who have not returned the earnest money are not permitted to seek actual damages. See McKeon v. Crump, 2002 UT App 258, 53 P.3d 494. The same procedure does not apply to buyers. If sellers default, buyers may elect to accept from sellers a sum equal to the earnest money deposit as liquidated damages, may sue sellers to specifically enforce the contract or may pursue other remedies available at law. There is no contractual provision as to how buyers are to make such election, nor is there a prerequisite before a buyer may seek liquidated damages, specifically enforce the contract or seek actual damages. However the REPC

provides that, if a buyer does make the election to accept liquidated damages, the seller is obligated to pay them upon demand.

There are no Utah cases defining how buyers under REPC's are to make the election to accept liquidated damages nor imposing a notice or demand obligation as a condition to making such election.

The trial court determined that NYA was required to make a demand in order to elect liquidated damages, and that by virtue of the failure to make the demand that NYA had elected liquidated damages. As support for its requirement the court cited a number of cases involving different contractual provisions. Van Zyverden v. Farrar, 393 P.2d 468 (Utah 1964) was an unlawful detainer action involving a forfeiture under a real estate contract which the contract language required a written notice to the buyer of the forfeiture and that buyer had become a tenant at will. Commercial Inv. Corp. v. Siggard, 936 P.2d 1105 (Utah App. 1997) involved a forfeiture (which the "law abhors" and under which the court stated the seller must comply strictly with the notice provisions) of a uniform real estate contract. The contract required two separate notices to the buyer, one was a notice of default, and the other was a notice informing buyer of his failure to cure and of seller's election of the forfeiture remedy. The contract language itself required notice of the election remedy. See also Adair v. Bracken, 745 P.2d 849 (Utah App. 1987).

Such cases are inapplicable to the instant case because there is no similar notice requirement for buyers under REPC ¶16. Nor is there a demand requirement under REPC ¶16 to elect the remedy of liquidated damages. The language of ¶16 merely states

that the buyer may make an election to accept liquidated damages. Contrary to the trial court's ruling there was no contractual requirement of a demand or notice in order to elect liquidated damages under the REPC.

Since neither the REPC nor Utah cases have defined how to elect liquidated damages, the above principles of *Angelos* apply. To make an election, the buyer would have to do something to evidence that it had made a choice of remedy and foregone the other available remedies. Moreover under *Angelos*, NYA's election of remedies should only be applied to protect Harrisons from double recovery.

C. NYA DID NOT ELECT TO PURSUE ACTUAL DAMAGES.

The trial court ruled that because of the stage to which NYA had litigated the matter, it had contractually elected "to pursue other remedies available at law", namely actual damages. NYA is unaware of any Utah case law in which litigation of breach of contract claims that seek damages, without a designation of actual or liquidated, constitutes an election to seek actual damages. Such ruling is contrary to *Angelos, Parrish* and the U.R.C.P. which allow the pleading of alternate claims and alternate remedies and only preclude double recoveries. Because NYA did not do anything in its litigation to indicate that it had made a choice to pursue actual damages and to forego liquidated damages, NYA should not be deemed to have made such election. The only evidence of a choice of remedy from the NYA's pleadings is NYA's initial summary judgment motion and its summary judgment motion for damages which both sought liquidated damages. Such pleadings are the only evidence of its choice of a remedy. NYA did not by its actions elect actual damages. The court should reverse the trial

court's holding and order that NYA had elected actual damages and return the matter to the trial court to award NYA its liquidated damages in the amount of the earnest money deposits made.

VII. NYA IS ENTITLED TO AN AWARD OF ADDITIONAL ATTORNEY'S FEES

A. NYA IS ENTITLED TO AN ADDITIONAL AWARD OF ATTORNEYS FEES FOR RESEARCH.

In conjunction with its summary judgment motion for damages, NYA submitted attorneys fees affidavits which complied with the requirements of Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988); EDSA/Cloward, LLC v. Klibanoff, 2008 UT App 284, 192 P.3d 296 (Utah App. 2008); and Cottonwood Mall Co. v. Sine, 830 P.2d 266 (Utah 1992), including descriptions of the work performed, the hours spent and the hourly rate. Each of the attorneys fees affidavits asserted that the work was reasonable and necessary. Harrisons objected because the affidavits did not identify the items or subjects researched nor did they identify the legal issues discussed with NYA. NYA asserted that disclosure of such detail was not required by the above cases and would be a violation of the work product rule and attorney client privilege. However, NYA's counsel submitted an affidavit that generally described the initial research issues and confirmed that the research entries at the time of each memorandum were relative to the issues in such memoranda. (R907-910) Notwithstanding, such affidavits, the trial court declined to award NYA certain of its attorneys fees for research because the subjects of the research were not disclosed. (R922).

Although the above cited cases include the requirement that the attorneys affidavit describe the work performed, no Utah cases require that the subjects researched be disclosed in such affidavit nor do they require disclosure of the legal issues discussed with the client. Subjects researched constitute attorney work product and should not be required to be disclosed in order to be entitled to recover such attorneys fees. Nor should the legal issues discussed with the client be subject to disclosure in order to recover for such attorneys work since they are confidential. NYA should be awarded additional attorneys fees with respect to the any time spent for research or legal issue discussions that were not awarded by the trial court because the subjects of the research or the issues discussed were not disclosed in the affidavits.

B. IF THE COURT DETERMINES THAT NYA IS ENTITLED TO PURSUE ITS LIQUIDATED DAMAGES CLAIMS, NYA IS ENTITLED TO RECOVER ATTORNEYS FEES FOR SUCH CLAIMS.

Trial courts are entitled to determine who is the prevailing party in litigation and are to apply a variety of factors set forth in R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1126-27, (Utah 2002). The trial court determined that NYA was the prevailing party and that attorneys fees were to be awarded. However, the trial court determined that NYA was not the prevailing party as to the part of its summary judgment motion for damages, as to the liquidated damages. If the Court determines that NYA is entitled to liquidated damages and to pursue such liquidated damages, then NYA would be the prevailing party as to such liquidated damages claims. NYA would therefore be entitled to an award of its

attorneys fees with respect to the liquidated damages claims that had not previously been awarded.

C. NYA IS ENTITLED TO ITS ATTORNEYS FEES ON APPEAL.

"Generally, 'when a party who received attorneys fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.' Brown v. Richards, 840 P.2d 143, 156 (Utah App. 1992)." Robertson's Marine, Inc. v. I4 Solutions, Inc., 2010 UT App 9, ¶16, 223 P.3d 1141 (Utah App. 2010). Since Harrisons appeal is not well taken, NYA, as the prevailing party, should be entitled to its additional reasonable attorneys fees incurred on this appeal.

The Court should remand the matter to the trial court for the award of additional attorneys fees to NYA for attorneys fees for research that was not previously awarded, for attorneys fees associated with its liquidated damages claims and for attorneys fee on appeal.

VIII. NYA IS ENTITLED TO ADDITIONAL PREJUDGMENT INTEREST.

A. NYA IS ENTITLED TO PREJUDGMENT INTEREST FROM THE DATE OF EACH PAYMENT OF EARNEST MONEY DEPOSIT.

In the 2014 Order and Judgment, NYA was granted prejudgment interest on the earnest money deposits it had made at the rate of 10% per annum as provided in UTAH CODE ANN. §15-1-1(2) from the date of the Harrisons' August 31, 2009 breach. (R 921)

It is well established under Utah law that:

> As to the allowance of interest before judgment, this court has heretofore spoken, and the law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can

> be measured by facts and figures, interest should be allowed from that time and not from the date of judgment.

Bjork v. April Indus., 560 P.2d 315, 317 (Utah 1977) As a matter of public policy, prejudgment interest is awarded to compensate a party for the depreciating value of the amount owed over time and, as a corollary, to deter parties from intentionally withholding an amount that is liquidated and owing. See Trail Mt. Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365 (Utah 1996); In Anderson, supra, the trial court had awarded prejudgment interest on the earnest money, down payment and taxes that had been paid from the date each of the payments were made. The court of appeals, applying the principles of *Bjork,* affirmed such award of prejudgment interest from the date of each payment because the damage was complete, the loss could be measured and the amount of each loss was fixed as of a particular time, namely as of the date of each payment. Id at ¶28. The same is true in the instant case. NYA should be entitled to prejudgment interest as of the date of each of its payments of earnest money.

In addition, if NYA is not awarded prejudgment interest from the date of each payment, Harrisons would receive the benefit and use of NYA's money during the time they had it without compensation to NYA. NYA would not be compensated for the period from each payment to the date of the August 31, 2009 for the depreciating value of the money owed. The deterrent effect on Harrisons would be reduced.

The court should award NYA interest at 10% per annum on each earnest money payment from the date of such payment and not just from the date of Harrisons' breach.

Such interest amounts have already been submitted to the court by affidavit. (R760-762)

B. NYA IS ENTITLED TO PREJUDGMENT INTEREST FROM AUGUST 31, 2009 ON THE LIQUIDATED DAMAGES AMOUNT.

If the Court determines that NYA is entitled to liquidated damages and to pursue such liquidated damages, then NYA would also be entitled to prejudgment interest on the liquidated damages amount at least from the date of the August 31, 2009. See Bjork, Supra and see Trail Mt. Coal Co. *Supra* for the public policy reasons that prejudgment interest should be awarded on the liquidated damages.

CONCLUSION

The court should deny Harrisons' appeal and should affirm the court's orders from which Harrisons appealed. The court should reverse the court's order that NYA elected actual damages and should remand the matter to the trial court to award NYA liquidated damages to NYA, interest on the liquidated damages to NYA, to award NYA interest on the earnest money payments from the dates thereof and to award attorney fees relative to the liquidated damages to, for research work not awarded and for attorneys fees on appeal.

Respectfully submitted this 4th day of June, 2015.

David D. Jeffs
Attorney for Plaintiff/Appellee
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, Utah 84603
(801) 373-8848

CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(A), the undersigned hereby certifies that this brief contains, 13,058 words, excluding the parts of the brief exempted by Utah Rule of Appellate Procedure 24(f)(1)(B).

David D. Jeffs

June 4, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF PLAINTIFF/APPELLEE** was served to the following this 4th day of June, 2015, in the manner set forth below:

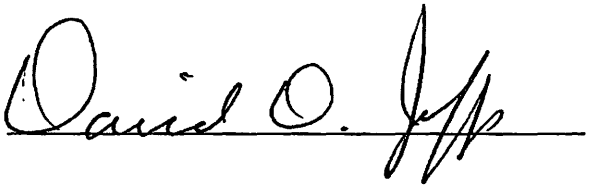
[ ] Hand Delivery

[X] U.S. Mail, postage prepaid

[ ] Federal Express

[ ] Certified Mail, Receipt No. _____, return receipt requested

Jason C. Boren (#7816)
Emily Wegener (#12275)
BALLARD SPAHR LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000



ADDENDUM

1. Utah Code Annotated § 15-1-1
2. Real Estate Purchase Contract for Land & Addendum No. 1
3. Addendum No. 2 to Real Estate Purchase Contract for Land
4. Letter from Steve Newman to Keith Kelly dated March 5, 2009
5. Letter from Keith Kelly to Mark Gaylord, et al dated August 31, 2009
6. Letter from Jason Boren to Keith Kelly dated September 2, 2009
7. Ruling on Cross Motions for Summary Judgment and Order on Cross Motions for Summary Judgment
8. Ruling on Motion to Reconsider and Order on Defendants' Motion to Reconsider
9. Ruling On Motion for Partial Summary Judgment on Damages
10. Order and Judgment on Plaintiff's Motion for Summary Judgment for Damages
11. Order and Judgment on Plaintiff's Motion to Amend Order and Judgment as to Attorney's Fees or to Augment Attorneys Fees Award and Defendants' Motion to Strike Reply Memorandum

EXHIBIT 1

Utah Code Ann. § 15-1-1

Statutes current through the acts of the 2015 General Session signed through March 20, 2015

- **Utah Code Annotated**
- **Title 15 Contracts and Obligations in General**
- **Chapter 1 Interest**

15-1-1. Interest rates — Contracted rate — Legal rate.

- **(1)** The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

- **(2)** Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

- **(3)** Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

History

L. 1907, ch. 46, § 1; C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, ch. 73, § 1; 1985, ch. 159, § 6; 1989, ch. 79, § 1.

Utah Code Ann. § 15-1-1

EXHIBIT 2

Utah Association of REALTORS®

REAL ESTATE PURCHASE CONTRACT FOR LAND

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer New York Ave. LLC offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of $10,000.00 in the form of Check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
(Signature of agent/broker acknowledging receipt of Earnest Money)

Brokerage: n/a Phone Number: 801-427-3516

OFFER TO PURCHASE

1. **PROPERTY:** 20.27 Acres off 950 W and approximately 700 S in Springville, UT - Parcel #26:041:0031 also described as: COM S 642.66 FT & E 358.49 FT FR N 1/4 COR, SEC. 5 T8S R3E SLB&M.; S 1 DEG 19'0"W 1326.54 FT; N 87 DEG 47'0"W 663.27 FT; N 0 DEG 53'30"E 1317.09 FT; S 88 DEG 36'14"E 672.96 FT TO BEG. AREA 20.272 AC. City of Springville County of Utah State of Utah, ZIP 84663 (the "Property").

1.1 **Included Items.** (specify) _____

1.2 **Water Rights/Water Shares.** The following water rights and/or water shares are included in the Purchase Price.
[ ] 0 Shares of Stock in the _____ (Name of Water Company)
No [X] Other (specify) All water rights attached to property and necessary for development

2. **PURCHASE PRICE.** The purchase price for the Property is $3,000,000.00
The purchase price will be paid as follows:

$10,000.00 (a) **Earnest Money Deposit.** Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

$_____ (b) **New Loan.** Buyer agrees to apply for one or more of the following loans:
[ ] CONVENTIONAL [ ] OTHER (specify) _____
If the loan is to include any particular terms, then check below and give details:
[ ] SPECIFIC LOAN TERMS _____

$_____ (c) **Seller Financing.** (see attached Seller Financing Addendum, if applicable)

$_____ (d) **Other** (specify). _____

$2,990,000.00 (e) **Balance of Purchase Price in Cash at Settlement.**

$3,000,000.00 **PURCHASE PRICE.** Total of lines (a) through (e)

3. **SETTLEMENT AND CLOSING.** Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (½) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(c), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

JH

4. **POSSESSION.** Seller shall deliver physical possession to Buyer within: [X] Upon Closing [ ] Other (specify)

5. **CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this contract:
[ ] Seller's Initials [ ] Buyer's Initials

Listing Agent n/a. represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Listing Broker for n/a. (Company Name) represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Buyer's Agent n/a. represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Buyer's Broker for n/a. (Company Name) represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(a), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":
(a) a Seller property condition disclosure for the Property, signed and dated by Seller;
(b) a commitment for the policy of title insurance;
(c) a copy of any leases affecting the Property not expiring prior to Closing;
(d) written notice of any claims and/or conditions known to Seller relating to environmental problems;
(e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and
(f) Other (specify) See addenda.

8. **BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE.** Buyer's obligation to purchase under this Contract (check applicable boxes):
(a) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
(b) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
(c) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;
(d) [X] IS [ ] IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;
(e) [ ] IS [X] IS NOT conditioned upon the Property appraising for not less than the Purchase Price;
(f) [ ] IS [X] IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;
(g) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)
See addenda.
If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 **Due Diligence Deadline.** No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 **Failure to Respond.** If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, the Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

8.4 **Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's

objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There [X] ARE [ ] ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: [X] Addenda No.'s 1 [ ] Seller Financing Addendum [ ] Other (specify) _____

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

[ ] SELLER [X] BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:

(a) the Property shall be free of debris and personal property;

(b) the Property will be in the same general condition as it was on the date of Acceptance.

11. FINAL PRE-CLOSING INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine only that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the Property as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances affecting the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

[ ] SHALL

[X] MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest

 Seller's Initials D.W. Date 11/10/06 Buyer's Initials CK Date 11/9/06

Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand.

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Seller Disclosure Deadline	SEE ADDENDUM #1	(Date)
(b) Due Diligence Deadline	SEE ADDENDUM #1	(Date)
(c) Settlement Deadline	SEE ADDENDUM #1	(Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by 5:00 [ ] AM [X] PM Mountain Time on November 18, 2006 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

Jeremy Kelly, manager 11/9/06

(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

New York Ave. LLC	1818 S 100 W, Orem, UT	84058	801-427-3516
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Zip Code)	(Phone)

JH

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

[ ] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. ____

David D. Harrison 11/10/06 Jo C. Harrison 11/10/06

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DAVID D. HARRISON P.O. Box 4500, STATELINE, NV. 89449

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

[ ] **REJECTION:** Seller rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

J.H.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ADDENDUM to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of November 9, 2006 between New York Ave, LLC, as Buyer, and Harrison, David & Jan, as Seller, regarding the Property, 20.27 Acres off 950 W and approximately 700 S in Springville, UT - Parcel #26:041:0031, Springville, Utah 84663. The following terms are hereby incorporated as part of the REPC:

1. Seller disclosure deadline to be 14 days from date of fully executed contract.

2. Due diligence deadline to be 90 days from date of fully executed contract to do any and all due diligence that the buyer deems necessary or prudent to determine that the property is satisfactory for Buyer's intended use. The due diligence approval shall be at the buyer's sole and absolute discretion.

3. Settlement deadline to be 180 days from date of fully executed contract.

4. $3,000,000 purchase price is based on the assumption that the property contains 20.27 Acres, which equates to $148,002 per acre. If the exact acreage is more or less than 20.27 acres the purchase price will increase or decrease accordingly based on $148,002 per acre.

5. Buyer will deposit the earnest money with First American Title Company located in Orem, Utah, within 5 business days from the date of a fully executed contract.

6. Buyer to pay Seller's closing costs not to exceed $10,000.

7. Seller agrees to sign within a reasonable time period all pertinent applications and documents required for governmental approval of Buyer's proposed development.

8. Seller agrees to give access to the Property during daylight hours for any testing, inspections, surveying, and other similar services for developing the Property, as the Buyer deems necessary. If any type of large motorized equipment will be brought onto the property it will be coordinated through the current lessee of the property as to minimize the impact on the current crop.

9. Buyer will be deemed to have approved the Property if the Buyer has not terminated this agreement by the Due Diligence Deadline. The day following the Due Diligence Deadline, the title company will disperse the earnest money to the Seller. This earnest money will then be deemed earned and non-refundable thereafter if Buyer fails to close for any reason. Released earnest money is the sole remedy to the Seller if the Buyer fails to close for any reason.

10. The Buyer may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline. This additional money will be paid monthly at a rate of $12,500 per month, and will be a credit towards the purchase price at closing.

11. If Buyer terminates this transaction for any reason, Buyer will turn over all surveys, engineering, soils reports, phase I reports, etc. that may have been completed at no additional cost to the Seller.

Seller shall have until 5:00 PM Mountain Time, November 18, 2006, to accept the terms of this ADDENDUM NO. 1 in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM NO. 1 shall lapse.

Buyer

New York Ave, LLC by manager 11/9/06 3:12 PM

Date Time

PLEASE INITIAL

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] ACCEPTANCE: Seller hereby accepts the terms of this ADDENDUM NO. 1.

[ ] COUNTEROFFER: Seller hereby presents as a counteroffer the terms of attached ADDENDUM NO. ____.

Seller

Harrison, David	Date	Time	Harrison, Jan	Date	Time
David D Harrison	11/10/06		Jan C Harrison	11/10/06	

[ ] REJECTION: Seller hereby rejects the terms of this ADDENDUM NO. 1.

Seller

Harrison, David	Date	Time	Harrison, Jan	Date	Time

810829

D.H.

GH 11/9/06 3:12 PM

EXHIBIT 3

ADDENDUM NO. 2
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [X] ADDENDUM [ ] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of November 9, 2006 including all prior addenda and counteroffers, between New York Ave. LLC as Buyer, and Harrison, David & Jan as Seller, regarding the Property located at Approx. 700 S 950 W, Springville, 84663, 26-041-0031. The following terms are hereby incorporated as part of the REPC:

1.Purchase is to include approximately 20.27 water shares, which will be transferred by Seller to Springville City per their requirement for Buyer's proposed development.
2.Buyer is to pay Seller's closing costs which include and are limited to title insurance, title fees, escrow fees, and greenbelt rollback taxes. Seller is to net $3 million for property after these fees are paid.
3.Date of fully executed contract is to be the latest signature date on this Addendum #2
4.Settlement deadline is to be extended until after the harvest season 2007 which will be October 31, 2007.
5.Extension fees that are noted on addendum #1 are to be reduced from $12,500 per month to $6,250 per month.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [ ] REMAIN UNCHANGED [ ] ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [ ] Buyer shall have until 5:00 [ ] AM [X] PM Mountain Time on November 24, 2006 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[ ] Buyer [ ] Seller Signature (Date) (Time) [ ] Buyer [ ] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] ACCEPTANCE: [X] Seller [ ] Buyer hereby accepts the terms of this ADDENDUM.

[ ] COUNTEROFFER: [ ] Seller [ ] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

David O. Harrison 11/22/06 Jan C. Harrison 11/23/06
(Signature) (Date) (Time) (Signature) (Date) (Time)

[ ] REJECTION: [ ] Seller [ ] Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

 Seller's Initials DH Buyer's Initials _____

EXHIBIT 4

ATLANTA, GA
BALTIMORE, MD
BETHESDA, MD
DENVER, CO
LAS VEGAS, NV
LOS ANGELES, CA
PHILADELPHIA, PA
PHOENIX, AZ
SALT LAKE CITY, UT
VOORHEES, NJ
WASHINGTON, DC
WILMINGTON, DE

STEVEN J. NEWMAN
DIRECT DIAL: (801) 517-6878
PERSONAL FAX: (801) 596-6878
E-MAIL: NEWMANS@BALLARDSPAHR.COM

March 5, 2009

Via Federal Express and E-mail kkelly@rqn.com

Keith A. Kelly, Esq.
Ray Quinney & Nebeker
PO Box 45385
Salt Lake City, Utah 84111

Re: Real Estate Purchase Contract ("REPC") between David and Jan Harrison ("Seller") and New York Ave., LLC ("Buyer")

Dear Mr. Kelly:

My firm has been retained to represent the Seller in connection with the matter referenced above. Please advise the Buyer that the Seller: (i) is not willing to terminate the contract pursuant to the terms set forth in your letter to Seller dated February 17, 2009; and (ii) does not agree with your characterization of the facts concerning the REPC as set forth in your letter.

After reviewing the REPC, we have determined that the Due Diligence Deadline has expired and, while the Buyer has the right to extend the Settlement Date by making an Extension Payment each month, the REPC is silent as to an outside Settlement Date and is therefore silent as to when Buyer's performance under the REPC must occur. It is unreasonable to interpret the extension provision in the REPC as allowing the Buyer to extend the Settlement indefinitely. It is well established in Utah that when a contract fails to specify a time by which a certain act must be performed, law implies that the act must be done within a reasonable time under the circumstances. *See* Bradford v. Alvey & Sons, 621 P.2d 1240 at 1242. It has been over 16 months since the original Settlement Deadline, Buyer has not closed on the purchase of the property, and any reasonable time for closing has already passed.

We view Buyer's failure to close as a breach of the implied covenant of good faith and fair dealing. Notwithstanding this breach, Seller is willing to close on or before August 5, 2009. Otherwise, Seller reserves all of Seller's rights and remedies set forth in the REPC.

At your earliest convenience, please call me to discuss a reasonable Settlement Deadline.

Very truly yours,

Steven J. Newman

SJN/sjn
cc: David and Jan Harrison (via fax)
Chris Anderson (via e-mail)
Steven Kelly (via fed-ex)

EXHIBIT 5

RAY QUINNEY & NEBEKER

SALT LAKE CITY OFFICE
PO Box 45385
Salt Lake City, Utah
84145-0385

36 South State Street
Suite 1400
Salt Lake City, Utah
84111

801 532-1500 TEL
801 532-7543 FAX
www.rqn.com

PROVO OFFICE
86 North University Ave.
Suite 430
Provo, Utah
84601-4420

801 342-2400 TEL
801 375-8379 FAX

August 31, 2009

Via Hand-Delivery, Email & Telefax

Mark R. Gaylord
Jason D. Boren
Steven J. Newman
Ballard Spahr Andrews & Ingersoll, LLP
Suite 800
One Utah Center
201 South Main Street
Salt Lake City, UT 84111-2221

Re: *Real Estate Purchase Contract between David and Jan Harrison, and New York Ave., LLC*
Extension Payment for August of 2009

Dear Mark, Jason & Steven:

As you are aware, I represent New York Ave, LLC, regarding the Real Estate Purchase Contract for Land ("REPC"), between your clients, David and Jan Harrison ("the Harrisons" or "Sellers"), and New York Ave, LLC ("my client" or "Buyer"). Originally, your clients the Harrisons signed the REPC on November 10, 2006, and they signed addenda #1 and #2 on November 10, 2006 and November 22, 2006, respectively. The REPC involved the sale of your clients' property located at approximately 950 W. and 700 S., Springville, UT, also known as parcel #26-041-0031, on November 10, 2006. This REPC is the subject of a lawsuit entitled *New York Ave., LLC v. David D. & Jan. C. Harrison*, Case No. 090402295 (Utah 4th D. Court) ("*NY v. Harrison*").

The REPC contains a clause with a due diligence period of 90 days in which my client had the ability to cancel the REPC at its discretion. The REPC also contains a clause, paragraph 10 in Addendum No. 1, that allows my client to extend the settlement deadline at monthly increments by paying an "additional amount of non-refundable earnest money" ("Extension Payment(s)") that would "be a credit towards the purchase price at closing."

As you know, during the due diligence period, my client learned that the city sewer was not available to service this property, thus making development of this property not economically feasible at the time at the current purchase price. It was possible that development would not be economically feasable for a number of years at the current purchase price. Therefore, prior to the end of the 90 day due diligence period, the REPC was renegotiated as memorialized in Addendum No. 2, dated November 22, 2006. At the time of the signing of addendum #2, my client made your clients aware that the sewer was not available to the property as originally anticipated. Therefore, the contract was amended due to the fact that the property could not be developed as originally anticipated.

Addendum No. 2, among other things, extended the settlement deadline to October 31, 2007, included 20.27 water shares in the sale, and reduced the monthly Extension Payment from $12,500 to $6,250, based on the understanding that it could take several years before this deal could be closed. This amendment was also based upon my client's understanding that:

(a) The purchase price for the property was based on the assumption that it could be developed as single family residential that would maximize the development potential of the land based on the zoning laws in place that govern the subject property. With the lack of sewer capabilities, and through further information garnered through the development process that showed insufficient storm drainage capacity, the property could not (at the time) be developed to its maximum potential.

(b) The ability to postpone closing on the property until it could be developed to its maximum potential was crucial to my clients. Accordingly, Extension Payments were "a credit towards the purchase price" of the property as stated in the REPC and was in no way to be considered "rent" or an interest payment.

(c) The closing deadline was being extended and Extension Payment reduced in part to account for the fact that, since the sewer was not readily available, it might be some time before the property could be developed as anticipated.

(d) The REPC could be extended, at my client's discretion as stated in the REPC, to allow for the property to be developed

to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinances of Springville city and existing market conditions.

My client has deposited $6,250 with First American Title Company on or before the last day of each and every month since the settlement deadline noted in Addendum No. 2, thereby extending the settlement deadline every month since that settlement deadline. You have denied this point, apparently claiming each such payment has not been made. This denial is found in paragraph 19 of your Answer ("Answer") filed in *NY v. Harrison*.

My client has performed and is continuing to perform under the parties' REPC. Accordingly, my client hereby provides you with the $6,250 August 2009 Extension Payment. We invite you to carefully discuss with your clients what they understood was the purpose of Amendment No. 2 to the REPC. By negotiating this $6,250 check, you are agreeing with my client that it is entitled under the REPC to make these payments in order to postpone closing in accordance with the express terms of the REPC until it is economically feasible to move forward with a residential development of the property as discussed above, including in paragraphs (a) through (d). My client is simply seeking the benefit of its bargain under the REPC, and nothing more – in light of your claims that my client may not now close under the REPC. Nothing in this letter should be construed as a demand by my clients for any rights or benefits other than those provided under the REPC.

I look forward to discussing this matter with you further in an attempt to resolve your clients' concerns. Nothing herein constitutes a waiver or election of any remedies or rights by my client.

Sincerely,

RAY QUINNEY & NEBEKER P.C.

Keith A. Kelly
Attorneys for Buyer New York Ave, LLC

1049491

EXHIBIT 6

LAW OFFICES
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
ONE UTAH CENTER, SUITE 800
201 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111-2221
801-531-3000
FAX: 801-531-3001
WWW.BALLARDSPAHR.COM

PHILADELPHIA, PA
BALTIMORE, MD
BETHESDA, MD
DENVER, CO
LAS VEGAS, NV
LOS ANGELES, CA
PHOENIX, AZ
VOORHEES, NJ
WASHINGTON, DC
WILMINGTON, DE

JASON D. BOREN
DIRECT DIAL: 801-517-6827
PERSONAL FAX: 801-596-6627
BORENJ@BALLARDSPAHR.COM

September 2, 2009

VIA FACSIMILE AND HAND DELIVERY

Keith A. Kelly, Esq.
RAY QUINNEY & NEBEKER
36 S State Street #1400
Salt Lake City, Utah 84111

Re: New York Ave, L.L.C. v. David and Jan Harrison
Civil No. 090402295

Dear Keith:

We are in receipt of your letter dated August 31, 2009, in the above-referenced matter. Like your previous correspondence, your letter attempts to insert conditions and other terms which are not part of the Real Estate Purchase Contract between New York Ave, LLC and David and Jan Harrison.

Contrary to your assertions, the contract was not amended due to the alleged unavailability of the sewer. If your client was not satisfied with what it discovered during the due diligence period, the Real Estate Purchase Contract provided for specific procedures to address such concerns. Your client failed to provide any written objections pursuant to the Real Estate Purchase Contract and cannot now claim that it was dissatisfied with what it discovered in the due diligence period.

Despite your client's claims that it cannot develop the property as originally anticipated, it has done nothing, to our knowledge, to obtain sewer, or any other development rights or other entitlements that may affect development of the property. Your client cannot sit idly by and wait for someone else to accomplish what is solely within its ability and control. To do so constitutes a breach of the implied covenant of good faith and fair dealing.

Moreover, your client's unexpressed intentions and "understanding" are simply irrelevant to the express language of the Real Estate Purchase Contract. See *Jaramillo v. Farmers Ins.*

Group, 669 P.2d 1231, 1233 (Utah 1983) ("It is well established in the law that unexpressed intentions do not affect the validity of a contract").

In short, your attempt to modify the terms of the Real Estate Purchase Contract and to make the negotiation of the monthly check conditioned upon your client's unilateral and unexpressed intentions and "understanding" is not only inappropriate, but constitutes a further breach of the parties' Real Estate Purchase Contract. See *Shields v. Harris*, 934 P.2d 653 (Utah App. 1997) (valid tender requires buyer to make bona fide unconditional offer of payment). Accordingly, we enclose and return the check that you hand delivered to our offices. Please be advised that we will continue to accept the monthly checks so long as you withdraw your inappropriate conditions.

By reason of your inappropriate and conditional tender of these monies, my clients intend to amend their counterclaim to assert a claim for your client's latest breach. Please notify me by the end of the week whether you will stipulate to allow the Harrisons to amend their counterclaim. In the event you refuse to do so, we will file a motion to amend with the Court. We look forward to your response.

Additionally, as you know, it has always been our position that the transaction should be closed within a reasonable time. *See Bradford v. Alvey & Sons*, 621 P.2d 1240 (It is well established in Utah that when a contract fails to specify a time by which a certain act must be performed, the law implies that the act must be done within a reasonable time). We have always been willing to discuss and negotiate a reasonable closing date. You have rejected our offers and attempts. We continue to be willing to discuss this matter. However, we believe the ball is in your court. Please let me know if you have any interest in discussing this matter further.

Sincerely,

Jason D. Boren

JDB/ldi
Enclosure
cc: Mark R. Gaylord, Esq.
Steven J. Newman, Esq.
Michael D. Mayfield, Esq.
Mr. David Harrison

NEW YORK AVE., LLC 03-07
BUSINESS ACCOUNT
1818 S 100 W
OREM, UT 84058

97-32/1243
071118590

869

DATE 8/31/9

PAY TO THE ORDER OF DAVID + JAN HARRISON $ 6,250.00

SIX THOUSAND TWO HUNDRED FIFTY and no/100's DOLLARS

Provo Riverside Plaza
Central Bank
1300 North State St. 378-6963
Provo, Utah 84604

MEMO SPRINGVILLE CONTRACT EXT.

⑆124300327⑆071 11859 0⑈ 0869

EXHIBIT 7

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company,

Plaintiff,

vs.

DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual,

Defendants.

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Date: June 14, 2012

Case No: 090402295

Judge David N. Mortensen

This matter is before the court on cross motions for summary judgment. The motion were fully briefed and argued before the court on April 19, 2012. The court has been fully informed and for reasons more fully set forth below denies defendant's motion and grants plaintiff's motion in part.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted where "the moving party is entitled to judgment as a matter of law," and "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Utah R. Civ. P.* 56(c). "[A]n adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* at (e).

Additionally, the court "will view the facts in a light most favorable to the party opposing the motion." *Brower v. Brown*, 744 P.2d 1337, 1338 (Utah 1987).

UNDISPUTED MATERIAL FACTS

1. NYA is a Utah limited liability company doing business in Utah County, Utah. Steven Kelly is the registered agent and manager of NYA.

2. The Harrisons are the owners of over 20 acres of real property located at approximately 950 West 700 South in the Springville, Utah (the "Property").

3. On or about November 10, 2006, the parties entered into a real estate purchase contract ("REPC") whereby NYA agreed to purchase the Property for $3 million.

4. Addendum #1, signed along with the REPC, provided that the Settlement Deadline was180 days from the date of the fully executed contract.

5. Addendum #1 provided as follows:

   "The Buyer may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline. This additional money will be paid monthly at a rate of $12,500 per month, and will be a credit towards the purchase price at closing."

6. On November 22, 2006, the parties entered into Addendum #2.

7. Addendum #2 provided that the "settlement deadline is to be extended until after the harvest season 2007 which will be October 31, 2007."

8. Addendum #2 reduced the Extension Payments to $6,250 per month and required the Harrisons to include 20.27 water shares with the purchase.

9. The parties have not agreed in writing to a limitation on the number of extensions of the settlement deadline that NYA may secure by timely payment of the Extension Payment.

10. The REPC and addenda provided that the initial earnest money deposit of $10,000 along with the monthly Extension Payments all constitute non-refundable earnest money that would have been applied to the purchase price at closing.

11. The parties have not entered into any addenda to the REPC other than Addendum #1 and Addendum #2 nor any other written agreements modifying the REPC.

12. REPC Addendum #2 states that the "date of the fully executed contract is to be the latest signature date on this Addendum #2," which is November 22, 2006.

13. Section 21 of the REPC states that "Time is of the Essence."

14. Under the terms of the REPC, NYA had 90 days from the date of the fully executed contract to conduct due diligence (the "Due Diligence Deadline").

15. If, prior to the Due Diligence Deadline, NYA determined that the results of its due diligence were unacceptable, it could choose to cancel the contract or to provide written notice to the Harrisons of its objections.

16. After the Due Diligence Deadline the earnest money was "deemed earned and non-refundable thereafter if Buyer fails to close for any reason."

17. On January 30, 2007, Mr. Kelly wrote a letter to the Harrisons informing them of a problem connecting the Property to the Springville sewer system. He further stated: "It looks like I won't be able to develop the property until mid-2008 at the earliest. However, I like the property and want to continue the contract as it is currently written...On October 31st I will start making the monthly payments to you that we agreed upon until I close the property, which will be when the sewer trunk line is installed and I can get the necessary approvals from the city to develop."

18. On September 19, 2007, Mr. Kelly wrote a letter to the Harrisons updating them on his progress in developing the Property. Specifically, he informed them that he had found a way to work around the problem with connecting to the Springville sewer system. He further stated, "I will be paying the extension fees as outlined in the purchase contract until I close. It shouldn't be too far into the future."

19. In October 2007, NYA began making the monthly Extension Payments in accordance with the terms of the REPC and its addenda.

20. In early 2008, Mr. Kelly attempted to get approval from Springville City to work around the sewer trunk line issue.

21. In April 2008, Mr. Kelly disclosed to his site engineer Brian Gabler that "[W]e are holding off pursuing this at the current time."

22. In July 2008, Mr. Harrison informed Mr. Kelly that he did not want to wait any longer for

NYA to close.

23. In December 2008, Mr. Harrison began discussing with Mr. Kelly his options for terminating the contract. The parties did not come to an agreement.

24. On March 5, 2009, the Harrisons through their attorney, Steve Newman, sent a letter to NYA stating that it had been 16 months since the original Settlement Deadline and that any reasonable time for closing had passed.

25. The March 5, 2009 letter asserted that NYA was in breach of the implied covenant of good faith and fair dealing, but that the Harrisons were willing to close on or before August 5, 2009.

26. The March 5, 2009 letter asserted that if not closed by August 5, 2009, the Harrisons reserved all their rights and remedies under the REPC.

27. On April 22, 2009, NYA's counsel sent a letter that stated, "My clients have the right to continue making the Extension Payments under the Contract, without an arbitrary and artificial August 5, 2009 deadline."

28. NYA did not agree in writing, or otherwise, to the August 5, 2009 closing date.

29. On May 14, 2009, after a failed settlement negotiation, the Harrisons informed NYA that it expected it to continue to perform its obligations under the REPC.

30. On August 31, 2009, NYA's counsel sent Harrison's counsel the Extension Payment along with a letter that contained that following:

(a) The purchase price for the property was based on the assumption that it could be developed as single family residential that would maximize the development potential of the land based on the zoning laws in place that govern the subject property. With the lack of sewer capabilities, and through further information garnered through the development process that showed insufficient storm drainage capacity, the property could not (at the time) be developed to its maximum potential.

(b) The ability to postpone closing on the property until it could be developed to its maximum potential was crucial to my clients. Accordingly, Extension Payments were "a credit towards the purchase price" of the property as stated in the REPC and was in no way to be considered "rent" or an interest payment.

(c) The closing deadline was being extended and the Extension Payment reduced in part to account for the fact that, since the sewer was not readily available, it might be some time before the property could be developed as anticipated.

(d) The REPC could be extended, at [NYA's] discretion as stated in the REPC, to allow for the property to be developed to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and

property being economically feasible to develop under zoning ordinance of Springville City and existing market conditions.

31. The August 2009 letter accompanying the Extension Payment stated, "Nothing in this letter should be construed as a demand by [Plaintiff] for any rights or benefits other than those provided under the REPC."

32. The Harrisons refused to accept the August 2009 Extension Payment as presented and in a letter from their counsel to NYA's counsel stated, "[Y]our attempt to modify the terms of the [REPC] and to make the negotiation of the monthly check conditioned upon your client's unilateral and unexpressed intentions and 'understanding' is not only inappropriate, but constitutes a further breach of the parties' [REPC.]"

33. The Harrisons informed NYA that they would "continue to accept the monthly checks so long as [NYA] withdraw [its] inappropriate conditions."

34. NYA has not closed on the Property and has not made or attempted to make any extension payments since August 2009.

ANALYSIS

1. Time of Performance

The Harrisons argue that NYA breached by failing to perform within a reasonable time. "[I]f a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances." *Coulter & Smith Ltd. v. Russell,* 966 P.2d 852, 858 (Utah 1998) (citing *Watson v. Hatch,* 728 P.2d 989, 990 (Utah 1986)). "When the parties to a

bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement (Second) of Contracts* § 204. A court "may allow a contract to be performed within a reasonable time only when the contract is silent as to the time for its performance." *Watson v. Hatch.* 728 P.2d 989, 990 (Utah 1986).

The parties explicitly agreed in the REPC and the addenda that the settlement deadline would be October 31, 2007. They also agreed that NYA "may choose, at its sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline." Therefore, each monthly extension payment extended the settlement deadline to the end of the following month.

The Harrisons use the Tenth Circuit case *Navair, Inc. v. IFR Americas, Inc.* (utilizing Kansas law) to assert that the reasonable time requirement still applies even if the contract contains a specific date for performance that has been extended. 519 F.3d 1131, 1138 (10th Cir. 2008). The *Navair* case is distinguishable from the present case. *Navair* involved a contractual dispute regarding the length of time an oral extension of the contract was valid for. The present case involves a contract which clearly states that extensions will be allowed and each extension will continue the contract monthly after the settlement deadline. Unlike *Navair*, there is no ambiguity regarding the extension of the contract deadline so long as a valid tender of extension

payment was made. Because the contract specified a time for performance, the court cannot impose a reasonable time.

The Harrisons contend that allowing NYA to continue making the extension payments indefinitely would lead to absurd results in that it would allow NYA to make interest-free payments for 40 years until the extension payments amounted to the purchase price. The Harrisons meanwhile would be forced to continue paying the carrying costs including property taxes. The Harrisons further argue that this could not have been the original intention of the parties because the parties did not execute the standard Seller Financing Addendum nor indicate anywhere in the REPC that they intended to create a seller-financed transaction.

The Utah Supreme Court held in, *Café Rio, Inc. v. Larken-Gifford-Overton, LLC,* that "[w]here the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." 207 P.3d 1235, 1240 (Utah 2009). "Only if the language of the contract is ambiguous will we consider extrinsic evidence of the parties' intent." *Id.*

The evidence before the court shows that the parties agreed to the extension payment clause of the contract. Addendum #1 of the REPC specifically states that NYA "may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline." It does not limit the number of times that the extension payments may be made, only that it is in NYA's sole discretion. The wording is clear

and unambiguous; therefore, NYA was entitled to extend the settlement deadline so long as valid tender of the extension payment was made.

NYA's statements in letters sent to the Harrisons regarding the time frame for settling constitute extrinsic evidence and cannot be considered by the court in determining if the contract contained a specific time for performance.

2. Anticipatory Breach

NYA claims that the Harrisons anticipatorily breached the contract by asserting that NYA was in default and demanding closing occur on August 5, 2009. As evidence of anticipatory breach, NYA points to comments made by Mr. Harrison to the effect that he wanted his $3 million and that he was not willing to wait around anymore. On March 5, 2009, the Harrisons' attorney sent a letter to NYA stating that it had been 16 months since the original settlement deadline and that any reasonable time for closing had passed. NYA claims that this letter implied that NYA was in breach of its performance under the REPC. The letter also stated that the Harrisons were willing to close on or before August 5, 2009, and that if NYA did not close by that date then the Harrisons reserved all their rights and remedies under the REPC. In addition, NYA points to the Harrisons' answers to the amended complaint in this action. Lastly, NYA points to the Harrisons' refusal to accept the August 31, 2009 Extension Payment as evidence of anticipatory breach.

"An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future." *Upland Industries Corp. v. P. Gamble Robinson Co.*, 684 P.2d 638, 643 (Utah 1984). An anticipatory breach occurs only if a party to a contract "manifests a positive and unequivocal intent not to render its promised performance." *Cobabe v. Stanger*, 844 P.2d 298, 303 (Utah 1992).

The Harrisons did not anticipatorily breach the contract. Although the Harrisons demanded that NYA close on or before August 5, 2009 and Mr. Harrison expressed his desire to either close or have NYA stop payments, these facts, especially viewed in a light most favorable to the Harrisons, do not "manifest a positive and unequivocal intent not to render [their] promised performance." *Id.* The Harrisons' statements, the letter and the pleadings are better described as negotiation and litigation techniques, not a manifestation of their intention to refuse future performance.

3. The August 31, 2009 Extension Payment Constituted Valid Tender

The letter accompanying the August 2009 Extension Payment lists the reasons why NYA originally intended to purchase the Property, namely, to develop for single-family residential homes; and the reasons why NYA has faced delays in readying the Property for development, namely, the sewer capabilities and storm drainage. Section (d) of the letter states:

> "The REPC could be extended, at my client's discretion as stated in the REPC, to allow for the property to be developed to its full potential. This

includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinances of Springville City and existing market conditions."

The Harrisons claim that NYA breached the express terms of the REPC by making the August 2009 Extension Payment contingent on the Harrisons' acceptance of additional terms and failing to make any subsequent Extension Payments.

"In order to be valid, tender of payment of money due must be ... unconditional." *PDQ Lube Ctr., Inc. v. Huber* 949 P.2d 792, 800 (Utah Ct. App. 1997). "A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon." *Sieverts v. White,* 2 Utah 2d 351, 273 P.2d 974 (Utah 1954). "The tender cannot impose on the other party a new condition or requirement not already imposed by the contract." *Kelley v. Leucadia Financial Corp.,* 846 P.2d 1238, 1243 (Utah 1992).

The August 2009 Extension Payment only contained conditions that NYA already had a right to insist upon based on the REPC, and therefore the extension payment was unconditional. The REPC does not explicitly state that closing would take place when it is economically feasible to develop, or based on the sewer line availability, storm drainage issues, or when the property could be developed to its maximum potential. The contract does, however, allow for extensions according to the Buyer's sole discretion. NYA's letter to the Harrisons noting its reasons for making the Extension Payments was a display of its discretion. The reasons for extending the closing are irrelevant inasmuch as those reasons flesh out NYA's discretion. The letter did not

add additional terms to the contract because according to the contract, NYA has the right to extend at its discretion. NYA's letter required the Harrisons to acknowledge rights that the contract had already granted to NYA; therefore, the August 2009 Extension Payment cannot be viewed as an invalid tender of payment. The Harrisons therefore breached the contract by refusing the valid tender.

When the Harrisons refused the August extension payment they told NYA that they would accept the extension payments so long as they were not accompanied by additional conditions. They claim that because NYA failed to tender any other payments that NYA was in breach of the REPC. "[U]nder the 'first breach' rule 'a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.'" *CCD, L.C. v. Millsap*, 116 P.3d 366, 373 (Utah 2005) (*quoting Jackson v. Rich,* 28 Utah 2d 134, 499 P.2d 279, 280 (1972)).

Because the Harrisons refused the valid tender of the August 2009 Extension Payment, NYA's refusal to make any further extension payments is not a "failure to perform." The Harrisons were the first party to breach the contract and "cannot complain if the other party (NYA) thereafter refuses to perform." *Id.*

A final note as to the August tender: the court did not give credence to the language in the letter accompanying the August tender which stated "Nothing in this letter should be construed

as a demand by [NYA] for any rights or benefits other than those provided under the REPC." Although the court agrees with this statement, the court was not influenced by it. If the letter had in fact required the Harrisons to agree to additional terms, the statement would have carried no weight so the court analyzed the letter without regard to that statement. .

4. Good Faith and Fair Dealing

The Utah Supreme Court, in *U.S. Fidelity v. U.S. Sports Specialty,* defines the covenant of good faith and fair dealing as "a duty not to intentionally or purposely do anything [that] will destroy or injure the other party's right to receive the fruits of the contract and to ... act consistently with the agreed common purpose and the justified expectations of the other party." *U.S. Fid. v. U.S. Sports Specialty*, 270 P.3d 464, 470 (Utah 2012).

Utah looks to the justified expectations of the parties to determine breach of good faith and fair dealing. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 200 (Utah 1991). This requires the court to look beyond the terms of the contract because an examination of contract terms alone is insufficient to determine the justified expectations of the parties. *Id.* However, "[n]o such covenant may be invoked ... if it would create obligations inconsistent with express contractual terms." *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, ¶ 10 (Utah 2011). "While a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante." *Oakwood Village LLC v. Albertsons, Inc.,* 104 P.3d 1226, ¶ 45 (Utah 2004).

NYA has presented facts that it intended to extend the contract until it could develop the property and the Harrisons have brought forth facts that show they wanted a speedy closing. Thus there is a fact issue as to the parties' justified expectations. In addition, the Harrison's claim as to breach of the covenant of good faith and fair dealing is denied because the contract granted NYA the right to the extensions according to NYA's sole discretion and to find them in breach of the covenant of good faith and fair dealing would be inconsistent with the express terms of the contract and would be the enforcement of duties to which the parties did not initially agree to.

5. Additional Earnest Money Deposits Apply to the Purchase Price

NYA seeks a summary declaratory judgment that the Additional Earnest Money Deposits apply to the purchase price. Addendum #2 changed the amount of the monthly extension payment from $12,500 to $6,250; nothing in Addendum #2 changed the provision that the Additional Earnest Money Deposits were to be applied to the purchase price at closing. The Harrisons do not dispute this claim and state that they have never disputed this claim during the course of this litigation. NYA is therefore entitled to declaratory judgment that the Additional Earnest Money Deposits be applied to the purchase price.

6. No Limitation on the Number of Extension Payments

The REPC does not expressly limit the number of extension payments that the Buyer is entitled to so long as the $6,250 extension payment is timely made. "A contract should be reformed only when its terms are so vague that the intention of the parties cannot be ascertained

therefrom." *Hidden Meadows Dev. Co. v. Mills*, 511 P.2d 737, 739 (Utah 1973). Placing a limit on the number of extension payments allowed would be reforming the contract and thereby rewriting the parties' agreement. The contract in this case is clear, and NYA is entitled to declaratory judgment that the REPC does not limit the number of extensions to which Plaintiff is entitled when it timely pays the Extension Payments.

7. Motion to Strike

Defendants moved to strike portions of the Steven Kelly affidavit. While the motion was well-taken, the issue is ultimately moot because the court did not rely on paragraphs 4, 5, 7, 10 or 13 of the affidavit in ruling on this matter.

CONCLUSION

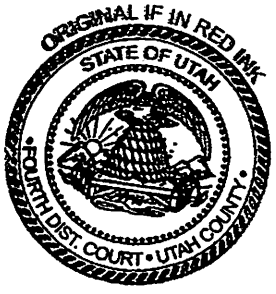
The Supreme Court of Utah in *Carlson v. Hamilton* said, "People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." 332 P.2d 989, 990-91 (Utah 1958); *See also Johnston v. Austin*, 748 P.2d 1084, 1089 (Utah 1988) (holding that courts should intervene and alter the contractual provisions only when the enforcement of the terms of the uniform real estate contract would be unconscionable). Though the Harrisons argue that allowing for indefinite extension payments would lead to absurd results, the courts may not step in to alleviate the effects of a bad bargain.

The contract in this case provides for a specific time of performance; therefore, this court cannot imply a reasonable time of performance. While the Harrisons' actions prior to August of 2009 did not manifest anticipatory repudiation of the contract, the Harrisons refusal to accept the August 2009 Extension Payment was an actual breach of the contract. Since the Harrisons breached the contract first by refusing a valid tender, they cannot then claim a breach by NYA in failing to perform. Because the Harrisons breached, NYA is entitled to its contractual remedies.

Plaintiff's motion for summary judgment is granted as to all claims except for the claim that the defendants breached the agreement anticipatorily, and Defendants' motion for summary judgment is denied. Additionally, Plaintiff's motion for partial declaratory summary judgment is granted in that the Additional Earnest Money Deposits apply to the purchase price and Defendants may not limit the number of extensions to which Plaintiff is entitled when it timely pays the Additional Earnest Money Deposits. Plaintiff's counsel will draft an order consistent with this ruling.

Dated this 14th day of June 2012.

BY THE COURT:



Judge David N. Mortensen
Fourth Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090402295 by the method and on the date specified.

MAIL: JASON D BOREN 201 S MAIN ST STE 800 SALT LAKE CITY, UT 84111
MAIL: DAVID D JEFFS 90 N 100 E POB 888 PROVO UT 84603-0888

Date: 06/14/2012

/s/ GEORGIA R SNYDER

Deputy Court Clerk

DAVID D. JEFFS, #1654
JEFFS & JEFFS, P.C.
Attorney for Plaintiff
90 North 100 East
P.O. Box 888
Provo, Utah 84603
Phones (801) 373-8848
Facsimile (801) 373-8878
E-mail: ddjeffs@jeffslawoffice.com

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Counterclaim Defendant, vs. DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual, Defendants and Counterclaimants.	**ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT** Case No. 090402295 Judge: David N. Mortensen

This matter having come before the Court for hearing on April 19, 2012 on Plaintiff's Motion for Summary Judgment and on Defendant's Motion for Summary Judgment. The parties were represented by counsel. The Court, having reviewed the pleadings, memoranda, affidavits and other evidence present and on file, having heard the parties arguments, and otherwise being

fully advised in the premises, issued its Ruling on Cross Motions for Summary Judgment. Based on the Court's Ruling on Cross Motions for Summary Judgment the Court now enters the following:

ORDER

1. Defendant's Motion for Summary Judgment is denied.

2. Plaintiff's Motion for Partial Summary Judgment as to NYA's Second Claim for Relief for Breach of REPC is granted, except for the claim of that Defendants anticipatorily breached the REPC, and Plaintiff is entitled to its contractual remedies.

3. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Third Claim for Relief for Declaratory Judgment is granted and it is hereby ordered that the Additional Earnest Money Deposits be applied to the purchase price under the REPC and that the REPC does not limit the number of extensions to which Plaintiff is entitled when it timely pays the Extension Payments..

4. Because the Harrisons breached, Plaintiff is entitled to its contractual remedies. However, the previous ruling of the court did not determine the amount of Plaintiff's damages. The issue of the amount of Plaintiff's damages, costs and attorneys fees is reserved at this time to be the subject of further motions or trial.

Dated and signed this 31st day of Dec., 2012.

Judge David Mortensen

APPROVED AS TO FORM:

Mark Gaylord
Jason D. Boren
BALLARD SPAHR, LLP

EXHIBIT 8

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company,

Plaintiff,

vs.

DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual,

Defendants.

RULING ON MOTION TO RECONSIDER

Date: July 5, 2013

Case No: 090402295

Judge David N. Mortensen

This matter is before the court on defendant's motion to reconsider this Court's earlier determination regarding cross-motions for summary judgment. This court received oral arguments from the parties. At that hearing, New York Avenue, LLC ("NYA") also made a motion for determination of damages, which motion was withdrawn. For the reasons which follow, this court denies the motion.[1]

Initially, the court should indicate that in its view the motion to reconsider should only consider new facts when a party claims that new evidence has arisen since the time of the court's prior ruling. That is not the case here. Instead, the defendant's motion is quite clear that

[1]The Court acknowledges that it has taken some time for the court to issue this ruling. However, given the parties great pains they have taken to provide the court with large body of case law, the Court has taken the opportunity to read all of those cases individually, engage in independent research, and undergo a contemplative review of this matter.

defendants assert that the court made mistakes of law or mistakes of applying facts to law which the court should reconsider. Particularly, defendants maintain that the court misconstrued the covenant of good faith and fair dealing and misapplied the tender statute. For these reasons, the Court is not considering any of the factual statements offered by any party in relation to this motion. Instead, the court has reviewed this motion to reconsider only on its legal basis under the factual predicate of the motion already heard.

Defendants make a number of assertions or pleadings which are inaccurate. Defendants maintain that the court ruled that the REPC term giving NYA discretion to extend the performance date for the contract "precludes the application of the covenant of good faith and fair dealing." This was not the ruling of the court. Instead, the ruling of the court was that under the particular circumstances of this case and the facts as presented to the court, defendants could not assert that plaintiff's reliance on an express term of the contract violated the covenant of good faith and fair dealing. There would remain innumerable ways in which the parties could have violated the covenant of good faith and fair dealing and the REPC's giving NYA discretion to extend the performance period might have nothing to do with such potential breaches of the covenant.

Strangely, defendants fail to recognize that their argument is that unilaterally announcing that the performance period could not be extended, in *direct* contravention of the express contractual terms, would be not in keeping with the covenant of good faith and fair dealing. The

court's determination here, in keeping with Utah precedent, is that the covenant of good faith and fair dealing did not apply because plaintiff was exercising an express condition of the contract.

In the present case, the court in no wise ruled that NYA had unfettered discretion in extending the contract. The court only ruled that it was not a violation of the covenant good faith and fair dealing to extend the contract in compliance with the express terms which provided, first, a time certain for the extension, and secondly, a component of additional consideration for the exercise of that discretion. This express provision of the contract is considered against the background that the parties could have limited the number of times the contract could have been extended or they could have provided for a back-end, or "drop dead," date by which NYA would have to perform. The parties chose not to include such a provision.

As plaintiff correctly points out, the covenant of good faith and fair dealing is limited:

> First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. Second, this covenant cannot create rights and duties inconsistent with the express contractual times. Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.

Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45, 104 P.3d 1226 (quoting *Olympus Hills Shopping Ctr., Ltd v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 447 n. 13 (Utah App. 1994).

In the present case, the assertion of the covenant as defined by the defendants would establish new and independent rights or duties to which the parties did not agree in the formation of the contract. The assertion of the covenant as defined by the defendants would create rights and duties inconsistent with the express contractual terms. Using the covenant to overcome the express terms of the contract would elevate the court's sense of justice above those express terms. This court declines to do so.

Ultimately, this court concludes there is no violation of the covenant good faith and fair dealing here because "There is no violation of the duty of good faith, ***as a matter of law***, when a party is simply exercising its contractual rights." *PDQ Lube v. Huber,* 949 P.2d 792, 798 (Utah App. 1997)(emphasis added). Here, the court concludes that NYA was simply exercising its contractual rights and therefore the court concluded, as a matter of law, that no violation of the duty of good faith and fair dealing had occurred. This court concludes that reasonable minds could not differ in concluding that NYA did not wrongfully exercised the express contractual provisions here.

The court has reviewed its decision regarding the tender in this case and does not believe that one party explaining to the other why it is taking certain actions in extending the contract, again pursuant to the express terms of the contract, violates the tender statute. Under the defendant's analysis had NYA simply sent a one line letter purporting to extend the contract with a check, everything would have been fine. However, explaining their thinking as to why they

were electing to extend made the offer somehow conditional in the defendants' minds. The court again disagrees. Instead, this court considered the context of the parties actions and specifically looked at whether the tender added new additional terms. This court concluded that the tender did not and therefore the tender was valid.

Accordingly, the motion for reconsideration is denied. Plaintiff's counsel shall submit on order for the court's signature.

Dated this 5th day of July 2013.

BY THE COURT:

Judge David N. Mortensen
Fourth Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090402295 by the method and on the date specified.

EMAIL: JASON D BOREN
EMAIL: MARK R GAYLORD
EMAIL: DAVID D JEFFS

Date: 07/05/2013

/s/ KIM OSTLER

Deputy Court Clerk

The Order of Court is ted below:
Dated: October 18, 20 /s/ David Mortensen
04:31:17 PM District Court Judge

DAVID D. JEFFS, #1654
JEFFS & JEFFS, P.C.
Attorney for Plaintiff
90 North 100 East/P.O. Box 888
Provo, Utah 84603
Phones (801) 373-8848
Facsimile (801) 373-8878
E-mail: ddjeffs@jeffslawoffice.com

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Counterclaim Defendant, vs. DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual, Defendants and Counterclaimants.	ORDER ON DEFENDANTS' MOTION TO RECONSIDER Case No. 090402295 Judge: David N. Mortensen

This matter came before the court on Defendants' Motion to Reconsider its ruling on the Cross Motions for Summary Judgment filed by the Plaintiff and the Defendants. The court having reviewed the motions and memoranda filed by the parties, having heard the oral arguments of counsel, being fully advised in the premises and having entered its ruling now makes and enters the following:

ORDER

1. Defendants maintain that the court ruled that the REPC term giving NYA discretion to extend the performance date for the contract "precludes the application of the covenant of good faith and fair dealing." This was not the previous ruling of the court. Instead, the previous ruling of the court was that under the particular circumstances of this case and the facts as presented to the court, defendants could not assert that plaintiff's reliance on an express term of the contract violated the covenant of good faith and fair dealing. The court's determination here, in keeping with Utah precedent, is that the covenant of good faith and fair dealing did not apply because plaintiff was exercising an express condition of the contract.

2. In the present case, the court in no wise ruled that NYA had unfettered discretion in extending the contract. The court only ruled that it was not a violation of the covenant good faith and fair dealing to extend the contract in compliance with the express terms which provided, first, a time certain for the extension, and secondly, a component of additional consideration for the exercise of that discretion. This express provision of the contract is considered against the background that the parties could have limited the number of times the contract could have been extended or they could have provided for a back-end, or "drop dead," date by which NYA would have to perform. The parties chose not to include such a provision.

3. In the present case, the assertion of the covenant as defined by the defendants would establish new and independent rights or duties to which the parties did not agree in the formation of the contract. The assertion of the covenant as defined by the defendants would create rights and duties inconsistent with the express contractual terms. Using the covenant to

overcome the express terms of the contract would elevate the court's sense of justice above those express terms. This court declines to do so.

4. The court concludes there is no violation of the covenant good faith and fair dealing here because "There is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights." PDQ Lube v. Huber, 949 P.2d 792, 798 (Ut App. 1997) (emphasis added). The court concludes that NYA was simply exercising its contractual rights. Therefore the court concluded, as a matter of law, that no violation of the duty of good faith and fair dealing had occurred. The court further concludes that reasonable minds could not differ in concluding that NYA did not wrongfully exercise the express contractual provisions.

5. The court has reviewed its decision regarding the tender in this case and does not believe that one party explaining to the other why it is taking certain actions in extending the contract pursuant to the express terms of the contract, violates the tender statute. Under the defendants' analysis had NYA simply sent a one line letter purporting to extend the contract with a check, everything would have been fine. However, Plaintiff's explaining their thinking as to why they were electing to extend made the offer somehow conditional in the defendants' minds. The court again disagrees.

6. The court considered the context of the parties actions and specifically looked at whether the Plaintiff's tender added new additional terms. The court concluded that the tender did not add new additional terms, and therefore the tender was valid.

7. Based on all of the foregoing, the Defendants' motion for reconsideration is

denied.

Dated this ____ day of _____, 2013

BY THE COURT

_____
Judge David N. Mortensen
Fourth Judicial District Court

EXHIBIT 9

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NEW YORK AVE, LLC, Plaintiff, v. DAVID HARRISON and JAN HARRISON, Defendants.	**Ruling on Motion for Partial Summary Judgment on Damages** Date: May 30, 2014 Case No. 090402295 Judge David N. Mortensen

Plaintiff has brought a motion for partial summary judgment on damages. Earlier, this court granted partial summary judgment as to liability. The present motion came before the court for oral argument on May 15, 2014. After interrogating[1] counsel, the court indicated that it felt it could rule as a matter of law as to the issue of the "election of remedies" provision of the real estate purchase contract at issue. However, the court indicated that if plaintiffs were seeking anything other than damages based upon what monies had been paid to defendants as earnest

[1]Utah Rule of Civil Procedure 56(d) provides that a court may "interrogate" counsel to ascertain what material facts exist without substantial controversy and thereupon make a determination of which facts will be adjudicated trial.

money or otherwise, then factual issues precluded entry of summary judgment.[2] Plaintiff's counsel requested, and was granted, leave to discuss with his clients whether to accept the amounts discussed by the court, or whether to proceed with trial. Tentative trial dates were set.

In a follow-up telephone conference of May 20, 2014, plaintiff indicated that it did not wish to proceed to trial, that plaintiff would only seek those damages previously addressed in court, and that plaintiff would prepare a judgment after receipt of a memorandum of this Court's ruling outlining the court's views on the election of remedies issue and a determination of reasonable attorneys fees. Defendants agreed with striking the trial and moving forward as indicated with the entry of the judgment.[3] The parties agreed that upon receipt of this court's ruling, plaintiff's counsel will prepare and submit a judgment and order reflecting the court's rulings, with leave to review the figure discussed in court for prejudgment interest, and submit those documents to the court. The court indicated that if a dispute arose as to the amount of prejudgment interest, plaintiff could insert their figure in their proposed judgment, defendants could objects thereto, plaintiff could respond to the objection, and the court would resolve the issue based upon those memoranda. Accordingly, the court explains the legal position regarding a election of remedies and rules as to attorneys fees as follows.

---

[2]Specifically, this court indicated that it viewed the case as defendants did and that the only damages thus far proved on the record before the court were $147,503 in return of money deposited with the defendants, $79,089.30 in prejudgment interest, and reasonable attorneys fees.

[3]Defendants expressly reserved their objection to, and their intent to appeal, any issues relating to liability.

Election of Remedies

Plaintiff claims to be seeking damages under paragraph 18 of the real estate purchase contract in this case. That paragraph states in pertinent part:

> If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this contract or pursue other remedies available of law. If Buyer elects to except liquidated damages, Seller agrees to pay the liquidated damages to Buyer ***upon demand***.

(emphasis added). The facts are undisputed before this court, and plaintiff's counsel acknowledged at oral argument, that plaintiff has never formally elected which of the contractual remedies under paragraph 18 it is seeking. Specifically, plaintiff acknowledges that it has never, including up to the time of oral argument on the motion for partial summary judgment, made any demand pursuant to paragraph 18 of the real estate purchase contract.

This court ruled that by virtue of litigating the matter up to the threshold of trial that plaintiffs had elected their remedy *contractually*. This court found from the circumstances that the buyer had elected to "pursue other remedies available at law," specifically actual damages.[4] Plaintiff argues however that "election of remedies" is simply a procedural device to ensure that a party does not recover twice for the same damages.

Plaintiff's position exhibits a fundamental misunderstanding between the procedural doctrine of election of remedies and a contractual provision for the election of remedies. Myriad

---

[4]Plaintiff has never claimed it was seeking specific performance.

cases show this distinction. Plaintiff cites the Utah Supreme Court case of *Angelos v. First Interstate Bank Of Utah*, 671 P.2d 772 (Utah 1983) which does explain the procedural doctrine.

> The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others.

Id. at 778 (quoting *Royal Resources, Inc. v. Gibralter Financial Corp.*, 603 P.2d 793, 796 (Utah 1979)). The application of the doctrine of election of remedies makes sense in the context of the *Angelos* case, where an orthodontist brought a claim against a bank for wrongful acceptance of checks with forged endorsements of the orthodontist's assistant. In *Angelos* the question was whether the orthodontist could obtain a judgment against both the bank and the assistant. Under the law, the *Angelos* court held that the orthodontist could proceed against both parties. Likewise, the doctrine of election of remedies would not allow a party in a contract action, for example, to recover both breach of contract and quasi-contract damages, since the theories are mutually exclusive. Still, modern pleading practice would allow alternative theories to be pled and even presented to the jury for a factual determination of which one applied. *See Parrish v. Tahtaras,* 7 Utah 2d 87, 318 P.2d 642 (1957). In this way, a party will not be required to make an election of remedies as a procedural matter.

A contractual provision for the election of remedies, on the other hand, is an entirely different matter. As far back as *Vam Zyverden v. Farrar,* 15 Utah 2d 367m 393 P.2d 468, 470

(1964) the Utah Supreme Court held that a contractual provision giving a party several alternative remedies "requires [the party] to make his election; and the [other party] is entitled to notice that he has done so." In *Adair v. Bracken,* 745 P.2d 849 (Utah App. 1987), a case with some similarities to the present case, the court held that a seller did not provide the buyer with adequate notice of default and notice of forfeiture as required by the contract, and this failure had a substantive effect. In the contractual context, action by a party can constitute a contractual election of remedies. This was the actual holding in *McKeon v. Crump,* 2002 UT App 258, 53 P.3d 494; that is, an act – failure to return the earnest money before filing suit – constituted a contractual election of remedies precluding other remedies under the contract. *See accord Groberg v. Housing Opportunities, Inc.,* 2003 UT App 67, 68 P.3d 1015 (renovators contractually elected remedy under purchase agreement and were *precluded* from maintaining an action for breach of the same agreement): *Commercial Invest. Corp., v. Siggard,* 936 P.2d 1105, 1109 n.7 (Utah App. 1997)(noting that a default notice did not give notice of an election of remedies, "a requirement of the contract terms.").

Because this case involves a contractual provision for the election of remedies, and not the procedural doctrine of election of remedies, and because plaintiff admits it has not ever (including up to the present time) made a demand required by the contract in this case, by pursuing this lawsuit plaintiff has elected contractually the remedy of seeking actual damages and not the "Earnest Money Deposit", however that term is interpreted, under paragraph 18 of the

contract.

Attorney Fees. The Court has previously concluded that plaintiff is the prevailing party in this matter and has indicated that attorney's fees should be awarded. Plaintiff has presented their attorneys fees up to the time of the motion as part of this motion for summary judgment. Defendant maintains that the amount of fees sought is unreasonable and that plaintiff is not entitled to certain attorneys fees or costs under the law.

The court has carefully considered the arguments of the parties in connection with attorneys fees and most particularly the multiple affidavits filed by plaintiff's current and former counsel. Upon review, as the court indicated at the hearing of this matter, the Court will not allow any of the costs claimed except for the filing fee of $360. The other costs are the normal expenses of litigation which should be subsumed in general attorneys fees, or they are otherwise not costs which have typically been allowed by Utah courts, and there has been no showing here of extraordinary circumstances as to why they should be allowed in this case.

Defendants have objected to the attorney's fees as being unreasonable and in one particular way this court agrees. Some entries on the billing statements indicate simply "research" with no indication as to the issues being researched. Under such circumstances, this court is unable to determine whether the issue would require the hours of research is indicated. Plaintiff has indicated that disclosing such information would violate the work product privilege. To this point, the court would note that the case is essentially over and there seems little reason,

if any, to withhold the information. More fundamentally, plaintiff's counsel is entitled to essentially keep secret the topics of this research. But at the same time, plaintiff cannot seek reimbursement for them when their subject matter is kept secret. The court has deducted from the attorney's fees all such entries. Finally, the court has considered the fact that a majority of fees incurred in the fall of 2013 are related to the present motion for partial summary judgment regarding damages. In the court's view, a significant part of the ultimate theory of the plaintiff did not prevail in this motion. And although, on balance in the case, plaintiff is the prevailing party, as plaintiff did not prevail substantially on this latest issue, the court has determined that the attorneys fees should be reduced by $4,700 as it relates to the motion on damages. Accordingly, the total fees awarded by this Court are $59,607.25.

In arriving at this fee award the court is left with no doubt that the legal work was actually performed. In fact, this court is been on the receiving end of the majority of the legal work. The legal work was reasonably necessary to adequately prosecute this matter. This entire case has been prosecuted and brought to a resolution by way of motion practice. Thus, the work was reasonably necessary. The attorneys' billing rates are consistent with those customarily charged in this locality for similar services, and if anything, those rate are either at the average or below it. The court has also considered the fact that the motion practice in this case has been substantial and the legal issues presented somewhat complex. Therefore, the amounts incurred for briefing the court on these issues are reasonable. Lastly, this court notes that the attorneys fee

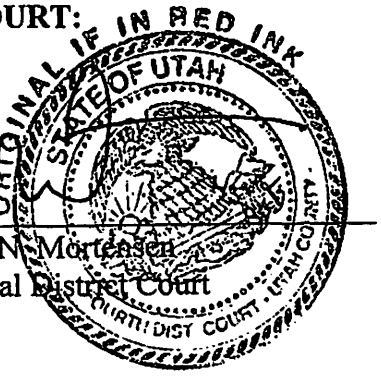
provision of the contract at issue is quite broad and includes expressly attorneys fees which may have been incurred prior to the commencement litigation, for which an affidavit has been filed, and to which no objection was lodged.

Conclusion

As indicated, plaintiff's counsel shall prepare and submit a judgment and order reflecting the court's rulings, with leave to review the figure discussed in court for prejudgment interest, and submit that document to the court within 10 days.

Dated May 30, 2014.

BY THE COURT:



Judge David N. Mortensen
Fourth Judicial District Court

EXHIBIT 10

The Order of Court is entered below:
Dated: July 01, 2014 01:10:25 PM
/s/ David Mortensen
District Court Judge

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Counterclaim Defendant, vs. DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual, Defendants and Counterclaimants.	ORDER AND JUDGMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FOR DAMAGES Case No. 090402295 Judge: David N. Mortensen

This matter came before the court on Plaintiff's Motion for Summary Judgment for Damages and Liquidated Damages on May 15, 2014. The court having reviewed the motion and memoranda filed herein, having heard the oral arguments of counsel, being fully advised in the premises and having entered its ruling which is adopted by reference, now makes and enters the following:

ORDER

1. Plaintiff seeks damages under Paragraph 16 of the Real Estate Purchase Contract which is at issue in this case and which provides in pertinent part:

> If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as

> liquidated damages, or may sue Seller to specifically enforce this contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand.

2. The facts are undisputed before this court, and plaintiff's counsel acknowledged at oral argument, that plaintiff has never formally elected which of the contractual remedies under paragraph 16 it is seeking. Specifically, plaintiff acknowledges that it has never, including up to the time of oral argument on the motion for summary judgment for damages, made any demand pursuant to paragraph 16 of the real estate purchase contract.

3. By virtue of litigating the matter up to the threshold of trial the Plaintiff has elected its remedy contractually. The court finds from the circumstances that the Plaintiff, as buyer, had elected to "pursue other remedies available at law," specifically actual damages.

4. Because this case involves a contractual provision for the election of remedies, and not the procedural doctrine of election of remedies, and because Plaintiff admits it has not ever (including up to the present time) made a demand required by the contract in this case, by pursuing this lawsuit Plaintiff has elected contractually the remedy of seeking actual damages and not a sum equal to the "Earnest Money Deposit", however that term is interpreted under Paragraph 16 of the real estate purchase contract, as liquidated damages.

5. The court has concluded that the Plaintiff is the prevailing party in this matter and has indicated that attorney's fees should be awarded to Plaintiff.

6. The court will not allow any of the costs claimed except for the filing fee of $360.00. The other costs submitted are the normal expenses of litigation, should be subsumed in general attorneys fees or are otherwise not costs that have typically been allowed by Utah courts, and are not

awarded to Plaintiff.

7. Some entries on the billing statements indicated simply "research" with no indication as to the issues being researched. Under such circumstances, the court is unable to determine whether the issues researched would require the hours of research indicated. Plaintiff has indicated that disclosing such information would violate the work product privilege. The court notes that the case is essentially over and there seems little reason, if any, to withhold the information. More fundamentally, Plaintiff's counsel is entitled to essentially keep secret the topics of this research. But at the same time, Plaintiff cannot seek reimbursement for them when their subject matter is kept secret. The court has deducted from attorneys fees all such entries.

8. The court has considered the fact that a majority of fees incurred in the fall of 2013 are related to the present motion for partial summary judgment. In the courts' view, a significant part of the ultimate theory of the Plaintiff did not prevail in the motion for summary judgment for damages. Although, on balance in the case, plaintiff is the prevailing party, as plaintiff did not prevail substantially on this latest issue, the court has determined that the attorneys fees should be reduced by $4,700 as it relates to the motion on damages.

9. In arriving at the attorney fee award, the court is left with no doubt that the legal work was actually performed. In fact, this court has been on the receiving end of the majority of the legal work.

10. The legal work was reasonably necessary to adequately prosecute this matter. This entire case has been prosecuted and brought to a resolution by way of motion practice. Thus, the work was reasonably necessary.

11. The attorneys' billing rates are consistent with those customarily charged in this locality for similar services, and if anything, those rates are either at the average or below it. The court has also considered the fact that the motion practice in this case has been substantial and the legal issues presented somewhat complex. Therefore, the amounts incurred for briefing the court on these issues are reasonable.

12. Lastly, the court notes that the attorneys fee provision of the contract at issue is quite broad and includes expressly attorneys fees which may have been incurred prior to the commencement of litigation, for which an affidavit has been filed, and to which no objection was lodged.

13. The total attorneys fees awarded to Plaintiff by this court are the sum of $59,607.25.

14. Based upon the foregoing, Plaintiff is awarded judgment against Defendants as follows:

A. Damages of $147,503.00

B. Interest at 10% per annum on the earnest money deposited with Defendants from August 31, 2009, the date of breach to June 23, 2014 $71,003.50. Per diem interest is $40.41

C. Attorneys fees $59,607.25

D. Court Costs $360.00

Total $278,473.75

15. After entry, such judgment shall bear interest as provided in U.C.A Section 15-1-4(3)(a).

16. The attorneys fees and costs awarded as provided above shall be augmented by such reasonable attorneys fees and costs as shall be incurred by Plaintiff in the enforcement or collection of the said judgment, as the same shall be established by affidavit.

THIS ORDER AND JUDGMENT EFFECTIVE WHEN SIGNED BY THE COURT ABOVE.

EXHIBIT 11

The Order of Court is ted below:
Dated: November 18, 14 /s/ David Mortensen
03:48:47 PM District Court Judge

DAVID D. JEFFS, #1654
JEFFS & JEFFS, P.C.
Attorney for Plaintiff
90 North 100 East/P.O. Box 888
Provo, Utah 84603
Phones (801) 373-8848
Facsimile (801) 373-8878
E-mail: ddjeffs@jeffslawoffice.com

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited liability company, Plaintiff and Counterclaim Defendant, vs. DAVID D. HARRISON, an individual, and JAN C. HARRISON, an individual, Defendants and Counterclaimants.	ORDER AND JUDGMENT ON PLAINTIFF'S MOTION TO AMEND ORDER AND JUDGMENT AS TO ATTORNEYS FEES OR TO AUGMENT ATTORNEYS FEES AWARD AND DEFENDANTS' MOTION TO STRIKE REPLY MEMORANDUM Case No. 090402295 Judge: David N. Mortensen

This matter came before the court on Plaintiff's Motion to Amend Order and Judgment as to Attorneys Fees or to Augment Attorneys Fee Award and upon Defendants' Motion to Strike Reply Memorandum. The court having reviewed the motions and memoranda filed herein, and being fully advised in the premises and having entered its ruling now makes and enters the following:

ORDER

1. Defendants' Motion to Strike the Plaintiff's Reply Memorandum in support of the Motion to Amend or Augment Attorneys Fees is granted.

2. The Court determines that Rules 52 and 59(e) of the Utah Rules of Civil Procedure are the appropriate mechanism for the determination of the additional or augmented attorney's fees requested by Plaintiff. The court further determines that Plaintiff's request was clearly timely in that Plaintiff raised the issue both before and immediately after the Court entered the Order and Judgment on July 1, 2014 (hereafter referred to as the "Order and Judgment").

3. Although the damages awarded to Plaintiff were resolved by way of summary judgment, the factual issue as to the amount of the attorney's fees was determined under Rule 73 and can be addressed at this point in the litigation.

4. The Court determines that attorney's fees were incurred by Plaintiff in late 2013 and 2014 which have not already been determined by the Court. Plaintiff is entitled to attorney's fees for the reasons previously articulated by the Court in the earlier rulings and the Order and Judgment.

5. As before, the Court finds that the legal work was actually performed. The legal work was, in part, reasonably necessary to adequately prosecute this matter. The attorneys billing rates are consistent with those customarily charged in this locality for similar services.

6. Of the $13,900.75 of additional attorneys fees claimed, a substantial portion of the fees claimed for June 16, 2014 are related to an application for fees brought through an

objection to the Order and Judgment, which process the Court has determined to be misplaced. The fees for such date should be reduced by $618.75, or half the time billed for such date.

7. Of the $13,900.75 additional attorneys fees, $10,521.00 were incurred on the same issues for which the Court had previously reduced Plaintiff's attorney's fees, namely liquidated damages, because Plaintiff did not prevail on a majority of the damages Plaintiff sought. The Court therefore concludes that such $10,521.00 of additional attorneys fees requested should be reduced by 50% or $5,260.00.

8. Reducing the $13,900.75 amount of attorney's fees sought by Plaintiff by $618.75 and $5,260.00 leaves the sum of $8,022.00, which this Court awards to Plaintiff as additional or augmented attorneys fees.

9. Accordingly the $59,607.25 total amount of attorney's fees awarded to Plaintiff in the Order and Judgment is amended or augmented to be the sum of $67,629.25, and the Order and Judgment is so amended.

10. The $278,473.75 total amount of the judgment granted to Plaintiff as set forth in the Order and Judgment is similarly augmented by the additional $8,022.00 to be a total of $286,495.75, and the Order and Judgment is so amended.

THIS ORDER AND JUDGMENT EFFECTIVE WHEN SIGNED BY THE COURT ABOVE.